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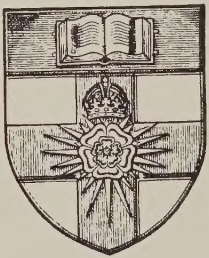

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ERRATA

[1961] 1 Q.B.

Page 367, line 12. For 373 *read* 575.

Page 375, line 28. For [1957] *read* [1956].

Pages 375 and 377: references to *In re Mahmoud and Ispahani* should read [1921] 2 K.B. 716.

CASES

DETERMINED BY THE

QUEEN'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM
OR FROM COUNTY COURTS

AND BY THE

COURT OF CRIMINAL APPEAL

ANGLO-OVERSEAS AGENCIES LTD. *v.* GREEN AND ANOTHER.

1960
July 19, 20.

Salmon J.

[1959 A. No. 2156.]

Company — Powers — Memorandum of association — Construction — "Main objects" rule—Declaration of intention that objects specified in any paragraph of objects clause "be in nowise limited . . . by "reference to or inference from" terms of any other paragraph—Whether "main objects" rule of construction excluded—First two objects of company to carry on export and import business—Subsequent object to obtain "concessions, contracts, rights . . . and to "carry the same into effect, operate thereunder, develop . . . main-"tain and sell . . . the same"—Whether property development ultra vires.

The objects for which a company incorporated under the Companies Act, 1948, was established were set out in clause 3 of the company's memorandum of association as follows: "(A) To "carry on business as importers, exporters, buyers and sellers of, "and dealers in, merchandise of all descriptions . . . (B) To "carry on business as exporters and importers of, and dealers in, "and agents for, home and foreign and colonial goods and produce

1960

ANGLO-OVERSEAS AGENCIES LTD. *v.* GREEN.

"of all descriptions . . . (E) To obtain the grant of, purchase, "or otherwise acquire any concessions, contracts, rights, patents, "privileges, monopolies, undertakings, or businesses, or any right "or option in relation thereto, and to perform and fulfil the "terms and conditions thereof, and to carry the same into effect, "operate thereunder, develop . . . maintain and sell, dispose of "and deal with the same." There followed a number of other objects and the clause concluded with the following declaration: "And it is hereby declared that . . . the intention is that the "objects specified in any paragraph of this clause shall, except "where otherwise expressed in such paragraph, be in nowise "limited or restricted by reference to or inference from the terms "of any other paragraph or the name of the company."

The company claimed damages against the defendants, an architect and a firm of estate agents, alleging, inter alia, breach of agreements by the defendants to assist and render certain services in connection with the obtaining by the company of a building lease of a site in a shopping centre for large store, shops and business development. The defendants denied the company's allegations and further objected that the carrying on of any such business and the making of any such agreements would be ultra vires the company and the objects for which it was established.

On the trial of the preliminary issue whether the agreements alleged were ultra vires the company:—

Held, that although it appeared from paragraphs (A) and (B) of clause 3 of the memorandum of association that the main objects for which the company was established were to act as exporters and importers of goods, the final paragraph of the clause, on its true construction, excluded the "main objects" rule of construction, so that each of the objects in the clause was to be read in isolation and not as ancillary to or limited or controlled by the first paragraphs and that, on that construction, paragraph (E) was wide enough to cover the project in connection with which the company had engaged the defendants. That project, therefore, and the making of the agreements alleged, was not ultra vires the company.

Cotman v. *Brougham* [1918] A.C. 514; (sub nom. *Re Anglo-Cuban Oil Bitumen and Asphalt Co. Ltd.*) 34 T.L.R. 410, H.L. considered.

Stephens v. *Mysore Reefs (Kangundy) Mining Co. Ltd.* [1902] 1 Ch. 745; 18 T.L.R. 327 not followed.

TRIAL OF A PRELIMINARY ISSUE.

The plaintiff company, Anglo-Overseas Agencies Ltd., was a company incorporated under the Companies Act, 1948. By clause 3 of the memorandum of association: "The objects for "which the company is established are: (A) To carry on business "as importers, exporters, buyers and sellers of, and dealers in, "merchandise of all descriptions . . . and generally any articles "or goods of any kind, whether manufactured or not. (B) To "carry on business as exporters and importers of, and dealers in, "and agents for, home and foreign and colonial goods and pro-"duce of all descriptions, and particularly of and in goods and "produce exported from or imported into the colonies. (C) To "carry on any trade or business whatsoever which can, in the "opinion of the directors, be advantageously carried on by the "company in connection with or as ancillary to any of the above "businesses or general business of the company. . . . (E) To "obtain the grant of, purchase, or otherwise acquire any con-"cessions, contracts, rights, patents, privileges, monopolies, "undertakings, or businesses, or any right or option in relation "thereto, and to perform and fulfil the terms and conditions "thereof, and to carry the same into effect, operate thereunder, "develop and turn to account, maintain and sell, dispose of and "deal with the same. (F) To acquire and carry on all or any "part of the business or property . . . of any person, firm, "association or company whether possessed of property suit-"able for any of the purposes of this company or carrying on "any business which this company is authorised to carry on "or not. . . . (I) To purchase, take on lease or exchange, hire or "otherwise acquire any real or personal property, rights or "privileges which the company may think suitable or convenient "for any purposes of its business; and to erect and construct "buildings and works of all kinds. . . . (S) To do all such other "things as are incidental or conducive to the attainment of any "of the aforesaid objects.

"And it is hereby declared that the word 'company' save "where used in reference to this company, shall be deemed to "include any partnership or other body of persons, whether "incorporated or not incorporated, and whether domiciled in the "United Kingdom or elsewhere, and the intention is that the "objects specified in any paragraph of this clause shall, except "where otherwise expressed in such paragraph, be in nowise "limited or restricted by reference to or inference from the terms "of any other paragraph or the name of the company."

On November 10, 1959, the company issued a writ against the defendants, Andre Green, an architect, and Angliss and Yarwood, a firm of estate agents, claiming damages for conspiracy and breach of contract. By its statement of claim the company alleged, inter alia, that they carried on the business of property development, and that the defendants were in breach of agreements, made in April and May, 1959, to assist the company and to render certain services in the obtaining by the company from the Merton and Morden Urban District Council a building lease of a valuable site in a key position in the Morden Shopping Centre consisting of 1·26 acres for large store, shops and business development.

The defendants denied the allegations. They further denied that the company had at any time carried on the business of property development, and alleged that the carrying on by the company of any such business, or of any such business as was the subject-matter of the claim, or the making of any such agreements as alleged would be ultra vires the company and the objects for which it was established, and they pleaded that if, which was denied, any of the alleged agreements were made or relationships entered into or the facts relied on by the company as constituting conspiracy were true, they still objected that the company was not entitled to rely on those agreements or relationships, or any of the alleged breaches or the alleged conspiracy, and objected further that the company had suffered no legal damage and that the whole of the action was ill-founded and unsustainable by the company.

The issue raised by that pleading, whether the agreements alleged were ultra vires the plaintiff company, was ordered, by consent, to be tried before the other issues in the action.

Neville Faulks Q.C. and *Morris Finer* for the defendants. The business of property development and, consequently, the making of the agreements alleged in the statement of claim are not within the words of any of the paragraphs of clause 3 of the memorandum of association of the plaintiff company. Even if they could, on one reading, be brought within the powers given by any of those paragraphs, the powers must be construed as ancillary to the main objects of the company, that is, the "main objects" rule of construction applies, namely, that where a memorandum of association expresses the objects of the company in a series of paragraphs and one paragraph, or the first two or three paragraphs, embody the "main object," the other paragraphs are to be read as limited or controlled by the main objects. The main objects of the plaintiff company are expressed in paragraphs (A) and (B) of clause 3 of the memorandum of association, and are to act as exporters and importers of goods. The business of property development is in no way ancillary to that object, and, therefore, applying the normal rule of construction, is ultra vires he company. [Reference was made to *Joint Stock Discount Co. Ltd.* v. *Brown.*[1]]

The declaration in the final paragraph of clause 3 is ineffective to prevent the application of the "main objects" rule of onstruction. In *Stephens* v. *Mysore Reefs (Kangundy) Mining Co. Ltd.* [2] Swinfen Eady J. held that this precise form of words did not do so. It seems to have been considered that that decision was overruled by the House of Lords in *Cotman* v. *Brougham* [3]; but the form of words in *Cotman* v. *Brougham* [3] was not the same as that in *Stephens* v. *Mysore Reefs (Kangundy) Mining Co. Ltd.*[4]; it was not argued that the *Stephens* case [4] was wrong, and he only reference to it in the speeches in the House of Lords was made by Lord Parker of Waddington,[5] who was clearly saying hat, but for the extra words, it would have covered that case, and was, by implication, approving the decision. It is submitted that *Stephens* v. *Mysore Reefs (Kangundy) Co. Ltd.*[6] was not overruled; although not binding, it has stood a long time and is very strong persuasive authority which this court should follow.

The purpose of the "main objects" rule of construction is to protect shareholders, so that the memorandum of association is not a "trap," *per* Lindley L.J. in *In re German Date Coffee Co.*[7] For the approach adopted by the courts to the construction of declarations such as this, see the opinion of Lord Wrenbury in *Cotman* v. *Brougham* [8]; see also *In re E. K. Cole Ltd.*[9]

C. A. Settle Q.C. and *Frederick Hallis* for the plaintiff company. The declaration in the last paragraph of clause 3 of the memorandum of association is effective to exclude the application of the "main objects" rule of construction. In *Stephens* v. *Mysore Reefs (Kangundy) Co. Ltd.*[10] Swinfen Eady J. was not addressing his mind to the particular form of words before him but held, as a matter of principle, that, whatever the form of words used, they could not override that rule of construction; see for example, his observation [11] that he was precluded by authority, in particular the dictum of Lindley L.J. in *In re German Date Coffee Co.*,[12] from holding otherwise. In *Cotman* v. *Brougham*,[13] although it was mentioned in the Court of Appeal,[14] the difference between the wording of the two clauses was not relied on. Nowhere was any distinction drawn between the different forms of words used in the two cases: see the way the *Stephens* case [15] was put in argument, and the judgments of Neville J.[16] and the Court of Appeal,[16] in particular the judgment of Lord Cozens Hardy M.R.[17] The House of Lords [18] all held that the ordinary rule of construction that effect must be given to the actual words used was paramount and that, where the memorandum of association said that each of the objects must be construed independently, the language was too clear for them to be construed otherwise. The statements of the law relating to such a construction in Palmer's Company Law, 17th ed. (1942), pp. 58–59, 472, and Halsbury's Laws of England, 3rd ed., vol. 6 (1954), p. 414 and note (*k*), are correct. *Cotman* v. *Brougham* [18] must therefore be taken to have overruled the *Stephens* case.[19] The principles relating to the question whether an agreement is ultra vires a company as between the company and its shareholders have no application to the same question as between the company and third parties. The substratum cases, although analogous, are concerned with equities between the shareholders and do not assist the court in this case.

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[1] (1866) L.R. 3 Eq. 139.

[2] [1902] 1 Ch. 745; 18 T.L.R. 327.

[3] [1918] A.C. 514 (sub nom. *In re Anglo-Cuban Oil Bitumen and Asphalt Co.*) 34 T.L.R. 410.

[4] [1902] 1 Ch. 745.

[5] [1918] A.C. 514, 520.

[6] [1902] 1 Ch. 745.

[7] (1882) 20 Ch.D. 169, 188, C.A.

[8] [1918] A.C. 514, 522 *et seq.*

[9] [1945] 1 All E.R. 521n.

[10] [1902] 1 Ch. 745.

[11] Ibid. 749.

[12] 20 Ch.D. 169, 188.

[13] [1918] A.C. 514.

Alternatively, if not overruled by *Cotman* v. *Brougham*,[20] the decision in *Stephens* v. *Mysore Reefs* (*Kangundy*) *Mining Co. Ltd.*[21] was wrong. This court is bound to apply the principle laid down in *Cotman* v. *Brougham* [22] that effect must be given to the actual words used, and, unless the words in this declaration are construed as meaning that each clause must be read in isolation, they are meaningless. On that construction, reliance is placed, in the main, on paragraph (E) of clause 3 as covering the transactions in question here.

Faulks Q.C. in reply. *Stephens* v. *Mysore Reefs* (*Kangundy*) *Mining Co. Ltd.*[23] was not overruled by *Cotman* v. *Brougham*.[24] There is no statement to that effect in Buckley on the Companies Acts, 12th ed. (1949), and 13th ed. (1957), at pp. 20, 21, and note (*p*), where the *Stephens*[25] and the *German Date Coffee*

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[14] [1917] 1 Ch. 477; 33 T.L.R. 196; sub nom. *In re Anglo-Cuban Oil, Bitumen, and Asphalt Co. Ltd.*

[15] [1902] 1 Ch. 745.

[16] [1917] 1 Ch. 477, 481.

[17] Ibid. 484.

[18] [1918] A.C. 514.

[19] [1902] 1 Ch. 745.

[20] [1918] A.C. 514.

[21] [1902] 1 Ch. 745.

[22] [1918] A.C. 514.

[23] [1902] 1 Ch. 745.

[24] [1918] A.C. 514.

[25] [1902] 1 Ch. 745.

Co.[26] cases are cited for the proposition that general words which, construed liberally, would include anything, must be limited by their context. It is surprising that, had it been intended to overrule the *Stephens* case,[27] not one of the seven judges concerned in *Cotman* v. *Brougham* [28] should not have said so. On the contrary, there are indications in the opinion of Lord Parker of Waddington [29] and the judgment of Lawrence J.[30] that their decision was based on the particular form of words used. In the same way, the decision of Swinfen Eady J. in the *Stephens* case [31] was based on the particular form of words used. The application of the "main objects" rule of construction does not render the words of this clause meaningless: see the approach of Swinfen Eady J.[32] on this point. This declaration is an attempt to evade the "main objects" rule of construction and enable the company to do anything, and the court will not give effect to it unless driven to do so by the words themselves, as the House of Lords was driven to do in *Cotman* v. *Brougham*.[33] [Reference was also made to Palmer's Company Precedents, 3rd ed. (1884), pp. 68 and 84.]

Even if the decision in the *Stephens* case [34] was wrong, it has not been shown that any of the paragraphs of clause 3, on any construction, empowers the plaintiff company to apply for a licence or building lease of the kind in question here. It is not a "concession" within paragraph (E). In its context, paragraph (E) envisages a trading company acquiring concessions in relation to contracts, rights, patents, and monopolies which are choses in action, and not in relation to real property. [Reference was made to Palmer's Company Law, 17th ed. (1942), pp. 59, 60.]

✓

Salmon J. The plaintiff company in this action claims damages for conspiracy and breach of contract against the defendants. It appears from the statement of claim that in the spring of 1959 the company engaged the first defendant, who is an architect, and the second defendants, a firm of estate agents, to assist the company upon certain agreed terms to obtain from the Merton and Morden Urban District Council the building lease of a valuable site in a key position in the Morden Shopping Centre. The statement of claim alleges, in effect, that thereafter the defendants, with intent to defraud the company, conspired together to assist a competitor of the company to obtain the building lease to which I have referred. The company alleges that, by reason of the defendants' conspiracy and breach of contract, the building lease went to a competitor of the company, and the company lost the large profit which it would otherwise have made out of the development of the site in question.

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[26] 20 Ch.D. 169.

[27] [1902] 1 Ch. 745.

[28] [1917] 1 Ch. 477; [1918] A.C. 514.

[29] [1918] A.C. 514, 519.

[30] [1917] 1 Ch. 477, 488.

[31] [1902] 1 Ch. 745.

[32] Ibid. 750.

[33] [1918] A.C. 514.

[34] [1902] 1 Ch. 745.

The defendants, by their amended defence, deny the alleged conspiracy and breach of contract, but also take the point that the acquisition of the building lease which I have mentioned would have been ultra vires the plaintiff company. It has been ordered that this point shall be tried as a preliminary issue, and it is that issue which I now have to decide.

The defendants rely on what is sometimes referred to as the "main objects" rule of construction, namely, that where a memorandum of association expresses the objects of the company in a series of paragraphs, and one paragraph, or the first two or three paragraphs, appear to embody the "main object" of the company, all the other paragraphs are treated as merely ancillary to this "main object," and as limited or controlled thereby. The principal purpose of this rule is for the protection of shareholders, so that they may know how the money they invest is to be used. The defendants as champions of this rule have cast themselves in a novel and perhaps not overwhelmingly attractive role. They say, in effect, "Even if we have caused the "plaintiff company, and accordingly their shareholders, serious "damage by conspiracy to defraud them, yet we can escape all "liability by reason of this very rule designed for the protection "of the shareholders." Nevertheless, whatever the merits may be, if the "main objects" rule does in law apply in this case, then the piece of business in respect of which the plaintiff company purported to engage the defendants was ultra vires the company, and the defendants would in law clearly be entitled to succeed in the action.

The objects for which the plaintiff company was established are to be found in clause 3 of its memorandum of association. The following are the opening words of the clause: "The objects for "which the company is established are:" then are set out a number of paragraphs from (A) to (S). Paragraphs (A) and (B) of this clause make it plain that the company's main object was to act as exporters and importers of a wide variety of goods. It is plain that the business of property development per se cannot be regarded as ancillary to this "main object." Accordingly, the paragraphs of clause 3 relied on by Mr. Settle as being wide enough, if looked at alone, to empower the company to engage in the business of property development, cannot so empower the company if the "main objects" rule is to be applied to them, that is to say, if these paragraphs are merely ancillary to, and limited by, paragraphs (A) and (B). Mr. Settle, however, relies on the concluding words of clause 3 as excluding the application of the "main objects" rule. I will read those words: "the intention is that the objects specified "in any paragraph of this clause shall, except where otherwise "expressed in such paragraph, be in nowise limited or restricted "by reference to or inference from the terms of any other paragraph or the name of the company."

Mr. Faulks, on the other hand, contends that in *Stephens* v. *Mysore Reefs* (*Kangundy*) *Mining Co. Ltd.*[1] Swinfen Eady J. considered this very form of words, and held that it did not exclude the "main objects" rule. Mr. Settle replies that *Stephens* v. *Mysore Reefs* (*Kangundy*) *Mining Co. Ltd.*[1] must be regarded as overruled by the decision of the House of Lords in *Cotman* v. *Brougham*,[2] but that, even if he is wrong in this, the *Stephens* v. *Mysore Reefs* case[3] ought not to be followed. If, as Mr. Settle suggests, Swinfen Eady J. decided the *Stephens* v. *Mysore Reefs* case[3] on the basis that no clause could effectively enact that each paragraph of the objects clause was to be read in isolation, then clearly *Cotman* v. *Brougham*[4] overrules this decision. If, on the other hand, he was merely construing the words before him, *Cotman* v. *Brougham*[4] leaves his decision standing.

The textbooks support the argument that *Stephens* v. *Mysore Reefs* (*Kangundy*) *Mining Co. Ltd.*[5] is no longer law; see, for example, Palmer's Company Law, 16th ed. (1938), p. 59 [20th ed. (1959), p. 89], and Halsbury's Laws of England, 3rd ed., vol. 6 (1954), p. 414 [note (*k*)]. I must confess that I find it difficult to ascertain precisely the basis on which Swinfen Eady J. did decide the *Stephens* v. *Mysore Reefs* case.[5] I incline to the view that he was merely deciding that the form of words before him (which is precisely the same as that before me) was not apt to exclude the "main objects" rule. I doubt whether he intended to convey that no form of words could exclude the rule. If this be so, *Cotman* v. *Brougham*[6] leaves his decision untouched, since the House of Lords was considering a different form of words, which I will read. The words before the House of Lords read as follows: "'The objects set forth in any sub-clause of this "'clause shall not, except when the context expressly so requires, "'be in any wise limited or restricted by reference to or inference from the terms of any other sub-clause, or by the name "'of the company. None of such sub-clauses or the objects "'therein specified or the powers thereby conferred shall be "'deemed subsidiary or auxiliary merely to the objects mentioned in the first sub-clause of this clause, but the company "'shall have full power to exercise all or any of the powers "'conferred by any part of this clause in any part of the world, "'and notwithstanding that the business, undertaking, property "'or acts proposed to be transacted, acquired, dealt with or "'performed do not fall within the objects of the first sub-clause "'of this clause.'" In that case the House of Lords held that those words were sufficient to exclude the "main objects" rule; whereas in the *Stephens* v. *Mysore Reefs* case[7] Swinfen Eady J. had held that the words before him were not sufficient to exclude the "main objects" rule. Had it been the intention of the House of Lords to overrule the *Stephens* v. *Mysore Reefs* case,[8] it is strange that it did not expressly do so. It appears to me that the House of Lords considered it unnecessary to express any opinion about the correctness of the decision of Swinfen Eady J., and, accordingly, it was not referred to in any of the speeches save that of Lord Parker of Waddington,[9] who expressed no concluded view upon it.

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[1] [1902] 1 Ch. 745; 18 T.L.R. 327.

[2] [1918] A.C. 514; (sub nom. *In re Anglo-Cuban Oil Bitumen and Asphalt Co. Ltd.*) 34 T.L.R. 410, H.L.

[3] [1902] 1 Ch. 745.

[4] [1918] A.C. 514.

[5] [1902] 1 Ch. 745.

If the words in this case, and in the *Stephens* v. *Mysore Reefs* case[10] do not mean that each paragraph of the objects clause is to be read in isolation, and is not to be limited or restricted by any other paragraph, I do not know what they do mean. Nor is any other meaning suggested by Swinfen Eady J. Any decision of this judge, of course, carries the greatest weight, and he speaks with especial authority on this branch of the law. Nevertheless, for the last 42 years, his decision in *Stephens* v. *Mysore Reefs (Kangundy) Mining Co. Ltd.*[10] has been generally regarded as no longer law. Even if that case is not overruled by the House of Lords in *Cotman* v. *Brougham*,[11] I do not think I should regard it as preventing me from giving effect to what, in my view, is the plain meaning of the words before me. In my view, the form of words used in *Cotman* v. *Brougham*[11] was merely an amplification of the form of words used here and in the *Stephens* v. *Mysore Reefs* case.[12] I hold that these words do exclude the "main objects" rule.

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[6] [1918] A.C. 514.
[7] [1902] 1 Ch. 745.
[8] Ibid.
[9] [1918] A.C. 514, 520.
[10] [1902] 1 Ch. 745.

The principal argument has centred round the points with which I have already dealt. Mr. Faulks has, however, also argued, with his usual skill, that, even if the "main objects" rule is excluded, yet no paragraph in clause 3 is sufficiently wide to empower the company to carry on the business of property development. Mr. Settle relies principally on paragraph (E), the material words of which read as follows: "To . . . acquire "any concessions, contracts, rights . . . and to perform and "fulfil the terms and conditions thereof, and to carry the "same into effect, operate thereunder, develop and turn to "account, maintain and sell, dispose of and deal with the same." In my judgment, these words are wide enough to cover the project upon which the plaintiff company engaged the defendants.

I accordingly hold that this project was not ultra vires the company, and I decide the issue before me against the defendants.

Judgment accordingly; the costs of the issue to be the plaintiffs' in any event.

Solicitors: *D. J. Freeman & Fraser; Kaufman & Seigal.*

J. F. L.

[11] [1918] A.C. 514.

[12] [1902] 1 Ch. 745.

ADDIS v. CROCKER AND OTHERS.

C. A.

1960
May 23, 24, 25.

Hodson, Pearce and Upjohn L.JJ.

[1959 A. No. 18.]

Libel and Slander—Privilege—Absolute privilege—Judicial tribunal—Disciplinary Committee constituted under Solicitors Act—Publication of order and findings relating to complaint against solicitor—Statements implicating third party not solicitor—Whether publication protected by absolute privilege—Solicitors Act, 1957 (5 *&* 6 *Eliz.* 2, *c.* 27), *ss.* 46, 47, 48, 49—*Solicitors (Disciplinary Proceedings) Rules,* 1957 (*S.I.* 1957, *No.* 2240), *rr.* 21, 31.

Open court—Tribunal sitting in private—Whether acting judicially—

Libel—Absolute privilege—Disciplinary Committee—Solicitors Act, 1957.

The Disciplinary Committee constituted under section 46 of the Solicitors Act, 1957, and the Solicitors (Disciplinary Proceedings) Rules, 1957, after inquiry into allegations of professional misconduct made against a certain solicitor, published the committee's findings and order, in which they found that the allegations against the solicitor had not been substantiated. The plaintiff (who was not a solicitor) brought a libel action against the members of the committee, alleging that certain statements in the findings and order which related to him were defamatory. The defendants set up a claim for absolute privilege in respect of the publication complained of and an order was made that the claim for privilege should be disposed of before the trial of the action.

The principal contention of the plaintiff was that it was a fundamental conception of British justice that proceedings should whenever possible be heard in public, and the Disciplinary Committee, which was compelled by its rules (rule 21 of the Solicitors (Disciplinary Proceedings) Rules, 1957),[1] to hear all its proceedings in private, was not a tribunal entitled to the privileges accorded to a court of justice.

The committee was empowered by the Solicitors Act, 1957, to administer the oath and order payment of penalties and costs; its orders were enforced in the same manner as a judgment of the High Court and an appeal from its decision lay direct to the High Court, and the parties can subpoena a witness: see sections 46 (6), 47 (2), 48 (1), 49 (2)[2]:—

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[1] Solicitors (Disciplinary Proceedings) Rules, 1957, r. 21: "The committee shall hear all applications in "private, but shall pronounce their "findings and orders in public."

[2] Solicitors Act, 1957, s. 46: "(1) "The Master of the Rolls shall appoint "from among members of the Council "[of the Law Society] and such "former members of the Council as "are practising as solicitors in Eng- "land a disciplinary committee con- "sisting of such number of persons, "not being less than three nor more "than nine, as he may from time to "time think fit, and may from time "to time remove any member from, "or fill any vacancy in, or, subject "to the limits aforesaid, increase the "number of the members of, that com- "mittee. . . . (4) . . . the disciplinary "committee, with the concurrence of "the Master of the Rolls, may from "time to time make rules for regu- "lating the making to the committee, "and the hearing and determining by "the committee . . . of applications "or complaints under this Act. . . . "(6) For the purposes of any applica- "tion or complaint made to the dis- "ciplinary committee under this Act, "the committee or any division thereof "may administer oaths, and the appli- "cant or complainant and any person "with respect to whom the applica- "tion or complaint is made may issue "writs of subpoena ad testificandum "and duces tecum, but no person shall "be compelled under any such writ "to produce any document which he "could not be compelled to pro- "duce on the trial of an action. "(7) The power to make rules "conferred by subsection (4) of this "section shall be exercisable by "statutory instrument, and the Statu- "tory Instruments Act, 1946, shall "apply to a statutory instrument con- "taining such rules in like manner as "if the rules had been made by a "Minister of the Crown."

S. 47: "(1) In addition to any

Held, (1) that although a tribunal with judicial functions to perform should in general deliberate in public, the committee did not necessarily fail to act in a manner similar to a court of justice by reason that it was directed to hear in private (and to give its findings and order publicly), and that that fact was not, therefore,

"other jurisdiction conferred upon the disciplinary committee by this Act, any application—(*a*) by a solicitor to procure his name to be removed from the roll; (*b*) by another person to strike the name of a solicitor off the roll, or to require a solicitor to answer allegations contained in an affidavit, shall be made to that committee: Provided that nothing in this subsection shall affect any jurisdiction of the Master of the Rolls or any judge of the High Court over solicitors exercisable apart from the provisions of this subsection by virtue of section fifty of this Act. (2) Subject to section fifty-four of this Act, on the hearing of any application or complaint made to the disciplinary committee under this Act, other than an application under section thirty-eight thereof, the committee or a division thereof shall have power to make such order as they may think fit, and any such order may in particular include provision for any of the following matters, that is to say—(*a*) removing from or striking off the roll the name of the solicitor to whom the application or complaint relates; (*b*) suspending that solicitor from practice; (*c*) payment by that solicitor of a penalty not exceeding £500, which shall be forfeit to Her Majesty; and (*d*) payment by any party of costs or of such sum as the committee or division may consider a reasonable contribution towards costs: Provided that upon proof of the commission of an offence with respect to which express provision is made by any section of this Act, the committee or division shall, without prejudice to their power of making an order as to costs, impose the punishment, or one of the punishments, specified in that section."

S. 48: "(1) Subject to the next following subsection, an appeal against any order made by the disciplinary committee or a division thereof on an application or complaint under this Act shall lie to the High Court at the instance either of the applicant or complainant or of the person with respect to whom the application or complaint is made, and every such appeal shall be made within such time and in such form and shall be heard in such manner as may be prescribed by rules of court. . . ."

S. 49: "(1) Every order made by the disciplinary committee . . . on an application or complaint made to the committee under this Act shall be prefaced by a statement of their findings in relation to the facts of the case and shall be signed by the chairman of the committee or by some other members of the committee authorised by the committee in that behalf. . . . (2) Every such order, . . . shall be filed with the Society, and as soon as it has been so filed shall be acted upon by the Society and be enforceable in the same manner as a judgment or order of the High Court to the like effect. . . . (4) The file kept by the Society for the purposes of this section shall be open to inspection by any person during office hours. . . ."

S. 88: "(2) Any instrument or other document whatsoever which was, or was treated as having been, made, issued, served or kept, and any other thing done, under or for the purposes of any enactment repealed by this Act shall be treated as having been made, issued, served, kept or done under or for the purposes of the corresponding provision of this Act; and, save where the context otherwise requires, any document referring, or to be construed as referring, to any enactment repealed by this Act, shall be construed as referring to the corresponding provision of this Act."

necessarily conclusive against the right to claim absolute privilege for such findings (post, pp. 25, 26, 29, 30).

Barratt v. *Kearns* [1905] 1 K.B. 504; 21 T.L.R. 212, C.A. considered.

(2) That since the functions and procedure of the committee were otherwise similar to those of a court of law its findings were absolutely privileged.

Royal Aquarium and Summer and Winter Garden Society Ltd. v. *Parkinson* [1892] 1 Q.B. 431; 8 T.L.R. 352, C.A. and *Dawkins* v. *Lord Rokeby* (1873) L.R. 8 Q.B. 255 (Exch.); (1875) L.R. 7 H.L. 744 applied.

Per Pearce L.J. Absolute privilege is given to proceedings in courts of law in order that judges, advocates and witnesses may perform their respective parts free from a deterrent fear of actions for defamation, and for the same reason is extended to tribunals which act judicially in a manner similar to courts of justice, but not to merely administrative tribunals (post, p. 28).

Decision of Gorman J. [1960] 1 Q.B. 87; [1959] 3 W.L.R. 527; [1959] 2 All E.R. 773 affirmed.

APPEAL from Gorman J.

On May 23, 1958, an application was made by a solicitor acting on behalf of the Law Society to the Disciplinary Committee set up under section 46 (1) of the Solicitors Act, 1957,[3] asking that a certain solicitor might be required to answer allegations of professional misconduct as a solicitor. The allegations concerned the conduct of a clerk in his employ. The Disciplinary Committee was composed of the three defendants, Sir William Charles Crocker, Sir Walter Charles Norton and Sir Leslie Peppiatt. On June 12, 1958, the plaintiff, Jasper Jocelyn Addis, an inquiry agent, presented a written request to the committee asking to be heard in denial of so much of the allegations in the application as he alleged falsely referred to him. His application was refused. On June 26, 1958, the committee heard the application against the solicitor in private as provided by rule 21 of the Solicitors (Disciplinary Proceedings) Rules, 1957, made pursuant to the Act of 1957; and on August 14, 1958, published their findings and order as provided by that rule. The committee found that the allegations against the solicitor had not been substantiated. In their findings and order they set out certain evidence given by the solicitor, and certain references were made to the plaintiff which the plaintiff alleged were libellous of him. He accordingly issued a writ against the three members of the committee, claiming that the findings and order was falsely and maliciously published by the first defendant with the knowledge and consent of the second and third defendants, of which all three were joint authors, and the document purported to be published concerning the affairs of the Law Society, of which he was not a member.

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[3] Ante, p. 12.

In their defence the defendants claimed that the publication complained of was made by them as members of the committee set up under sections 46 to 48 of the Solicitors Act, 1957, and the Solicitors (Disciplinary Proceedings) Rules, 1957, being their findings, order and determination of the application of May 23, 1958, and that the publication occurred in the course of and formed part of proceedings before a statutory tribunal exercising judicial functions and was therefore absolutely privileged. Alternatively, they pleaded that the publication was protected by qualified privilege. In his reply the plaintiff alleged malice in respect of the defence of qualified privilege.

An application made by the defendants under R.S.C., Ord. 25, r. 4, to strike out the statement of claim was not allowed by Devlin J. On May 11, 1959, an order was made in chambers that the following question of law, or alternatively of law and fact, should be tried as a preliminary issue before the trial of the action: whether the publication of the words complained of was absolutely privileged, and whether the publication was made under the provisions of and in accordance with the authority of the Solicitors Act, 1957, and the Solicitors (Disciplinary Proceedings) Rules, 1957.

Gorman J. held that the inquiry of the Disciplinary Committee was absolutely privileged and no action for defamation would lie in respect thereof. The plaintiff appealed to the Court of Appeal.

The plaintiff in person. There are two kinds of absolute privilege: that of courts of law and that of other tribunals, not being courts of law, who act in a manner similar to courts of law and observe the principles of natural justice; whether the latter are absolutely privileged depends on the manner in which their proceedings are conducted. If it be shown that one of these bodies has acted contrary to their own rules and contrary to principles of law they are not entitled to absolute privilege. Therefore, to some extent the facts are important.

The Disciplinary Committee are not authorised by their rules to print anything more than the findings and order, but this document goes further, it also prints the submissions and the so-called evidence. My submission is, that not only did I not issue the writ, but that it is impossible on the documents for me to have issued it, the tribunal only dealt with hearsay evidence.

[HODSON L.J. The fact that the tribunal accepts hearsay evidence has nothing whatever to do with the question whether the tribunal is absolutely privileged.]

If this tribunal is to be accorded absolute privilege, it must observe the principles of absolute fairness and exercise the ordinary principles of justice. It is not in dispute that *Royal Aquarium and Summer and Winter Gardens Society Ltd.* v. *Parkinson* [4] decides what kind of tribunal can be granted absolute privilege. There never has been any final judgment conferring absolute privilege on a tribunal that sits permanently in secret; in every single case where absolute privilege has been accorded to a tribunal, not being a court, it has only been to tribunals who conform to the principle that (except in rare cases) they sit and hear their cases in public. It is the first qualification of a judicial tribunal that it should sit in public: Halsbury's Laws of England, 3rd ed., vol. 9, p. 342. This tribunal must, by its own rules, always sit in private, although its decisions are given in public. It is axiomatic that British justice is, subject to certain exceptions, administered in public, and that justice must not only be done but must "be seen to be done": *Scott* v. *Scott* [5]; *Rex* v. *Sussex Justices, Ex parte McCarthy* [6]; Halsbury, vol. 24, pp. 49–50.

In general, all cases both civil and criminal are heard in public, but in very special cases, where it is for the protection of the public, the court can sit in private: Halsbury, vol. 9, p. 345.

In *Leeson* v. *General Council of Medical Education and Registration* [7] it was said of the General Medical Council that, being created by statute, the element of natural justice was imported into its inquiries, and the court there prescribed the manner in which such a domestic tribunal should act. The General Medical Council more nearly approximates to a court of law than the Disciplinary Committee, because it does not hear its cases in private, but it is contended that that body is not a tribunal which has absolute privilege, although the matter does not yet appear to have been decided. But even if that body does have absolute privilege it would not affect this case, because, except in special cases, the General Medical Council must hear their cases in public. [He also referred to *Allbutt* v. *General Council of Medical Education and Registration*[8]; *Thompson* v. *New South Wales Branch of the British Medical Association*[9]; Halsbury, vol. 15, p. 261.] In *Copartnership Farms* v. *Harvey-Smith*,[10] where a tribunal claimed absolute privilege, the fact that its proceedings were conducted in public was considered to be an attribute of a domestic tribunal acting in a quasi-judicial capacity.

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[4] [1892] 1 Q.B. 431; 8 T.L.R. 352, C.A.

[5] [1913] A.C. 417; 29 T.L.R. 520, H.L.

[6] [1924] 1 K.B. 256, 259; 40 T.L.R. 80, D.C.

[7] (1889) 43 Ch.D. 366, C.A.

There is no authority which confers absolute privilege on a tribunal which convicts or passes judgment in respect of a charge that has already been disposed of in another court. A great deal of importance is attached to the rule of autrefois convict. A person might be convicted of an offence and yet remain in jeopardy of proceedings before the Disciplinary Committee for the offence on which he has already been arraigned.

Where a tribunal has been granted absolute privilege on the ground that it is equivalent to a court of law, its members always have to take an oath, whether it be the oath of a judge, or, for example, the oath of a court-martial. There has never been any case where private citizens can become judges and claim absolute privilege unless they take an oath. By taking the oath they are differentiating themselves from private citizens and entering into the capacity of judicial persons. The committee itself has, moreover, no power to issue a subpoena.

The rules of the Disciplinary Committee teem with provisions entirely contrary to the principles of law, and they are full of irregularities; the most extraordinary is rule 31, a general dispensing rule which gives carte blanche to the committee to dispense with any requirements of the rules or irregularities in proceedings, and goes a long way to show that it is not a judicial tribunal.

If quasi-judicial bodies are to have absolute privilege they must act within their jurisdiction. The Disciplinary Committee have not acted within their jurisdiction, since by publishing the so-called evidence which is defamatory of me, they have gone outside their own rules, which only permit publication of the findings and order.

Even if the Disciplinary Committee has absolute privilege, by publishing the evidence, they have published something which goes beyond the findings and order which they are under a statutory duty to publish, and therefore only qualified privilege attaches. [He also referred to Winfield on Tort, 6th ed., p. 768.]

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[8] (1889) 23 Q.B.D. 400; 5 T.L.R. 651, C.A.

[9] [1924] A.C. 764; 40 T.L.R. 506, P.C.

[10] [1918] 2 K.B. 405; 34 T.L.R. 414.

T. G. Roche Q.C. and *Helenus Milmo* for the defendants. The history of the Disciplinary Committee is of some relevance in showing that it is a body having the attributes of a tribunal which conducts a judicial inquiry and so is entitled to absolute privilege; it was created by statute and is acting under statutory powers. It was established for the first time by the Solicitors Act, 1888, and it is not a committee of the Law Society, but its members are nominated by the Master of the Rolls from members or ex-members of the council of the Law Society. By the Act of 1888 the committee was only given power to inquire and report, but by the Solicitors Act, 1919, it was given power to hear and determine on disciplinary matters. This procedure has, with gradually increasing powers, continued until today. These powers are exercised concurrently with the High Court, and a solicitor charged with misconduct can be brought before the court or before the Disciplinary Committee. After the Solicitors Act, 1919, a solicitor was given a right of appeal to the High Court from the findings of the Disciplinary Committee.

In *Lilley* v. *Roney* [11]—which was a case of striking out a statement of claim—the proceedings before the Law Society were treated as judicial proceedings. In *Barrett* v. *Kearns* [12] a committee inquiring into the inadequate performance of ecclesiastical duties of a benefice was held to be conducting a judicial inquiry and accorded absolute privilege. That inquiry does not appear to have been held in public. Similarly, in *Dawkins* v. *Lord Rokeby* [13] a military court of inquiry which was held to be entitled to absolute privilege did not appear to sit in public.

The principle is that courts of justice must do justice, and as a rule the courts sit in public; but there are three categories of exceptions to this rule: (1) Where the judge hearing the case thinks it appropriate in the particular circumstances that they should sit in private, such as the defence of the realm or a secret process case, or where infants or wards of court are concerned. (2) Proceedings in chambers, which include not only interlocutory matters. (3) Where Parliament decides that particular proceedings should be heard in private, for example, medical evidence in nullity cases based on the ground of impotence. No one would suggest that the divorce court is not entitled to absolute privilege when hearing such evidence.

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[11] (1892) 61 L.J.Q.B. 727; 8 T.L.R. 642, D.C.

[12] [1905] 1 K.B. 504; 21 T.L.R. 212, C.A.

[13] (1873) L.R. 8 Q.B. 255, Exch.; (1875) L.R. 7 H.L. 744.

If this tribunal is approached along the lines suggested by Lord Esher in the *Royal Aquarium* case,[14] namely, on the basis that absolute privilege applies, not only to courts of law but also to authorised inquiries before tribunals having the attributes of a court of law, there is no doubt but that this is a judicial tribunal. It is set up by statute and its procedure is governed by statutory instrument; its members must be members or ex-members of the Council of the Law Society, and therefore they must be legally qualified persons. The functions of the Disciplinary Committee are purely judicial and it has no administrative functions; it is not a licensing body and has no licensing powers. The General Medical Council, on the other hand, has many administrative functions, a doctor who is struck off the register is not prohibited from practising, but he loses a number of privileges; a solicitor struck off the roll cannot continue to practise as a solicitor, thus, the decision of the committee affects his status.

The Disciplinary Committee has power (a) to order payment of costs or fines, and its orders may be enforced in the same manner as an order of the High Court; (b) to administer oaths, and (c) parties may obtain a writ of subpoena from the High Court; this is consistent with the practice whereby the High Court assists inferior courts: see *Rex* v. *Wiltshire Appeal Tribunal, Ex parte Thatcher*.[15] An appeal to the High Court from the Disciplinary Committee lies to the Divisional Court, and it exercises concurrent jurisdiction with the High Court: see Solicitors Act, 1957, ss. 46 to 50.

If the committee exercises concurrent jurisdiction with the High Court, it would surely be incredible that these proceedings, which might have been brought straight away before the High Court instead of before the committee, should not be granted the same privileges as the court, when they are performing the same function as the court itself. It is a misapprehension in the circumstances to say that one must find something in the rules to entitle the committee to claim privilege. Apart from rule 21, the whole proceedings would be heard in public, and it is obviously for the protection of a solicitor charged with misconduct that they should be held in private until an order is made.

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[14] [1892] 1 Q.B. 431.

[15] (1917) 86 L.J.Q.B. 121; 32 T.L.R. 657, C.A.

The protection of absolute privilege extends to anything done in the course of judicial proceedings. Everything in this document is properly within the terms of the findings and order; and even if it were not, it would be something done in the course of judicial proceedings. It is conceded that the privilege must be in respect of what is done in the course of the proceedings, if it were after judgment, the judge would be functus officio. If this committee is entitled to absolute privilege, the only question is, was this document pronounced in the course of proceedings? And the answer must be in the affirmative.

A point was taken that the committee acted on hearsay evidence; but even if they wrongly admitted evidence (which is submitted they did not), that could not affect their right to claim privilege: *Munster* v. *Lamb*[16]; *Scott* v. *Stansfield.*[17]

The plaintiff replied.

Hodson L.J., having stated the facts, continued: The principle of law to be applied is to be found conveniently stated in the judgment of Lord Esher M.R. in *Royal Aquarium and Summer and Winter Garden Society Ltd.* v. *Parkinson.*[1] In that case a meeting of the London County Council for granting music and dancing licences which was held under the provisions of an Act of Parliament was held "not a court within the meaning of the "rule by which defamatory statements made in the course of "proceedings before a court are absolutely privileged." Lord Esher said[2]: "It is true that, in respect of statements made in "the course of proceedings before a court of justice, whether by "judge, or counsel, or witnesses, there is an absolute immunity "from liability to an action. The ground of that rule is public "policy. It is applicable to all kinds of courts of justice; but "the doctrine has been carried further; and it seems that this "immunity applies wherever there is an authorised inquiry which, "though not before a court of justice, is before a tribunal which "has similar attributes. In the case of *Dawkins* v. *Lord Rokeby*[3] "the doctrine was extended to a military court of inquiry. It "was so extended on the ground that the case was one of an "authorised inquiry before a tribunal acting judicially, that is to "say, in a manner as nearly as possible similar to that in which "a court of justice acts in respect of an inquiry before it. This

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[16] (1883) 11 Q.B.D. 588, C.A.

[17] (1868) L.R. 3 Ex. 220.

[1] [1892] 1 Q.B. 431; 8 T.L.R. 352, C.A.

[2] [1892] 1 Q.B. 431, 442.

[3] (1873) L.R. 8 Q.B. 255, Exch.; (1875) L.R. 7 H.L. 744.

"doctrine has never been extended further than to courts of "justice and tribunals acting in a manner similar to that in which "such courts act."

I will refer also to *Dawkins* v. *Lord Rokeby*,[4] which is a decision of the House of Lords. That was a case arising out of a military court of inquiry. His Royal Highness the Duke of Cambridge, who was then Commander-in-Chief, directed that a court of inquiry should be held to inquire into certain matters set forth in a letter written under His Royal Highness's authority by the Adjutant-General of the Forces. The letter directed certain officers to sit as members of a court of inquiry to be assembled under the presidency of General Woodford; and the court of inquiry sat and heard evidence. In the House of Lords, on appeal from the Exchequer Chamber, the Lord Chancellor put the following question to the judges[5]: "Whether the opinion and "ruling of the learned judge in this case, as stated in the bill "of exceptions, and his direction thereupon to the jury, were "right in point of law?"; and the following answer to the question proposed was given by the Lord Chief Baron in the name of the judges[6]: "My Lords, these of Her Majesty's judges who "have had the honour of attending your Lordships during the "argument of this case, are unanimously of opinion that the "question put to them by your Lordships must be answered in "the affirmative. A long series of decisions has settled that no "action will lie against a witness for what he says or writes in "giving evidence before a court of justice. This does not pro"ceed on the ground that the occasion rebuts the prima facie "presumption that words disparaging to another are maliciously "spoken or written. If this were all, evidence of express malice "would remove this ground. But the principle, we apprehend, "is that public policy requires that witnesses should give their "testimony free from any fear of being harassed by an action "on an allegation, whether true or false, that they acted from "malice. The authorities, as regards witnesses in the ordinary "courts of justice, are numerous and uniform. In the present "case, it appears in the bill of exceptions that the words and "writing complained of were published by the defendant, a mili"tary man, bound to appear and give testimony before a court "of inquiry. All that he said and wrote had reference to that "inquiry; and we can see no reason why public policy should not

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[4] L.R. 7 H.L. 744.

[5] Ibid. 752.

[6] Ibid. 752, 753.

"equally prevent an action being brought against such a witness "as against one giving evidence in an ordinary court of justice." The House of Lords adopted the opinion of the judges. I do not think it is necessary to read their speeches. I only make this observation because it has a bearing on this case—that, so far as one can tell from the report, the inquiry was intended to investigate the fitness of the officer in question for command, and although witnesses were compellable, in the sense that they were ordered to attend, they were not sworn; nor is there any indication that the inquiry was open to the public.

It is necessary, in a matter of this kind, to consider, as Sankey J. did in *Copartnership Farms* v. *Harvey-Smith*,[7] to which I shall also refer, the constitution and functions and the procedure of the tribunal in question to decide whether the rule of absolute privilege applies. The Disciplinary Committee is set up under the provisions of an Act of Parliament, the Solicitors Act of 1957, which in turn succeeded earlier Solicitors Acts. The history of the matter, so far as it is necessary to state it, is that by the Solicitors Act, 1888, a statutory committee was for the first time appointed, the members of which were nominated by the Master of the Rolls, with power to inquire and report to the court if there were any case to answer; and by the Solicitors Act, 1919, they were given power to hear and determine matters affecting solicitors, as they have now, and they were given powers of punishment which have since been increased. Moreover, the right of appeal was then introduced.

[His Lordship read sections 46 (1) (4) (6) (7), 47 (1) (2), 48 (1) and 49 (1) (2) (4) and 88 (2) of the Solicitors Act, 1957, referred to section 50 and continued:] The plaintiff's contention is that there can be no absolute privilege here, and he has put forward five contentions. First of all, his main contention is that the proceedings were held in private. His second contention is what I call for convenience his autrefois acquit contention, which is in effect this, that a solicitor may well be subject to criminal prosecution and afterwards may be called before this committee on a disciplinary charge, and that the functions of that committee in so acting are inconsistent with those of a judicial body. His third contention is that the procedure laid down by the rules is inconsistent with the judicial function. His fourth contention is that there was here such an irregularity in proceeding (to which I shall refer in further detail) as to show that the tribunal was

[7] [1918] 2 K.B. 405; 34 T.L.R. 414.

not acting judicially; and his fifth contention is that even if the hearing itself was protected by absolute privilege, the findings and order, or that part of it which contained the libel, was outside the scope of a judicial inquiry.

Before dealing with those contentions, I must refer to the rules. One of the plaintiff's contentions is that the rules are such that the conduct of the tribunal is inconsistent with that of a judicial body, and I can deal with that shortly. We have been referred to a number of the rules, one of which is the rule to which he of course desires to draw to the particular attention of the court—the rule about hearings in public; but the other rules are, broadly speaking, on the same lines as the Rules of the Supreme Court. It is true that in some respects they go further. There is, for example, rule 31, to which the plaintiff has drawn particular attention—that "The committee may dispense " with any requirements of these rules respecting notices, affida- " vits, documents, service, or time, in any case where it appears " to the committee to be just so to do." That is a power which goes further than any rule of the Supreme Court, which contains only R.S.C., Ord. 70, r. 1, which, in the appropriate cases, enables breaches of the rules to be overlooked. There is a further rule to which the appellant has drawn attention with regard to cases in which the tribunal may adjourn proceedings, enabling fresh charges to be made. There again, he says that that goes outside the scope of a judicial inquiry. But however that may be, the answer to this point with which I am dealing first is that the rules are statutory rules and orders which have come into existence in pursuance of the Act of Parliament to which I have referred, and they do not form any basis for a sound contention that the procedure of this tribunal is such that it cannot properly be regarded as judicial.

Rule 21 introduces the first point. "The committee shall " hear all applications in private, but shall pronounce their find- " ings and orders in public." The document to which I have referred is headed "Findings and order" and is obviously drawn up in that form in order to comply with the rule and with the Act of Parliament, the relevant sections of which I have read. It was (as the evidence shows) not read out in full, but it was handed out and published publicly, although the hearing had taken place, in accordance with the rule, in private.

Perhaps, having said that, it may be convenient to postpone returning to the point about publicity and deal with the last point —that even if the hearing itself was protected, the findings and orders are not. I think the short answer to that is that the findings and order were an intrinsic part of the hearing, and if the hearing itself is protected by absolute privilege, the same applies to the findings and order; and the subsidiary point that matters irrelevant to the findings and order were included in the document which is called " findings and order " really comes under another point which has been made, to which I shall refer in a moment. So far as publicity is concerned, this is the most formidable—indeed I think the only formidable—part of the plaintiff's case; because he is quite right in saying that it is axiomatic, so far as British justice is concerned, that proceedings should be, wherever possible or convenient, subject to the overriding rule that justice must be administered in public; and he quite rightly relies on the observations of the House of Lords in *Scott* v. *Scott*,[8] where that was laid down in very clear terms, and on the observations of Lord Hewart C.J. in *Rex* v. *Sussex Justices, Ex parte McCarthy*,[9] when he said that justice must not only be done but [10] must " be seen to be done." He relies also upon, and is able to get some assistance from, the decision of Sankey J. in *Copartnership Farms* v. *Harvey-Smith*.[11] That was a case concerning the activities of a tribunal which was set up by Act of Parliament for the purpose of dealing with applications for exemption from military service. Clause 4 of the regulations in that case reads as follows [12]: " All applications to the local " tribunal shall be heard in public, unless the tribunal, in any " particular case, due regard being given to the interests of the " parties and of any other person concerned in the application, " consider that an application or any part of the proceedings " thereon should be heard in private; provided that the tribunal " may exclude the parties and the public at any time during " the hearing of an application for the purpose of conferring upon " any question affecting the decision of the application." Sankey J. said [12]: " In my view that is a power which is one of the attri" butes of a judicial tribunal, and the mere fact that it is granted " to the tribunal in question does not, I think, show that it is not " a judicial tribunal. To my mind it points the other way, the " intention being that there may be no doubt but that the local " tribunal shall have the attributes of a judicial tribunal." He came to the conclusion that the object of these regulations was to assimilate the tribunal to a judicial tribunal[13]—"that is to "say, to make it a tribunal acting in a manner similar to that in "which courts of justice act." That case is only of assistance in so far as it shows, I think, indirectly, that Sankey J. was paying attention (as, indeed, Mr. Roche conceded it was right to pay attention) to this particular feature of justice, that it was prima facie to be administered in public.

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[8] [1913] A.C. 417; 29 T.L.R. 520, H.L.

[9] [1924] 1 K.B. 256; 40 T.L.R. 80, D.C.

[10] [1924] 1 K.B. 259.

[11] [1918] 2 K.B. 405.

[12] [1918] 2 K.B. 412.

But, of course, the plaintiff was not able to say that courts must always sit in public, because he knew (as, indeed, *Scott* v. *Scott*[14] shows) that there are many cases where the courts do not sit in public because the interests of justice demand otherwise: there are cases concerning secret processes and cases of wards of court and so forth. But he says that unless a court generally sits in public (subject to exceptions) the protection should not apply. There is, of course, no authority for such a broad proposition as that, and, indeed, an examination of the authorities leads to the contrary conclusion, particularly in the cases where this question has arisen. I have already cited *Dawkins* v. *Lord Rokeby*[15]; and there is another case which brings out the point very clearly, *Barratt* v. *Kearns*,[16] which was a case where a commission had been issued by the bishop of a diocese under the Pluralities Act, 1838, and the Amendment Act of 1885, to inquire into the inadequate performance of the ecclesiastical duties of a benefice, and where the decision was that that was a judicial tribunal, and the occasion upon which a witness gave evidence before the commissioners was absolutely privileged and no action was maintainable in respect of evidence so given. It so happened that the counsel engaged in the case for the plaintiff drew attention in his argument to the fact that this was a private inquiry; but although he was Mr. Fraser, a man who subsequently became a leading authority on the law of libel, he did not even take the point that the fact that it was a private inquiry disabled the tribunal or those who gave evidence before it from claiming absolute privilege. There is no need for me, I think, to go into the facts of that case. For the purposes of this point it is sufficient to say that the inquiry was in private; it is quite clear that that was so; and nevertheless it was said that the rule of absolute privilege applied. It was pointed out by Mr. Roche, on behalf of the defendants, that of course there are numbers of other cases where justice is administered in private, as in judges'

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[13] [1918] 2 K.B. 412, 413.

[14] [1913] A.C. 417.

[15] L.R. 7 H.L. 744.

[16] [1905] 1 K.B. 504; 21 T.L.R. 212, C.A.

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chambers. No one would be likely to dispute that proceedings in judges' chambers are judicial proceedings for all purposes and would be the subject of absolute privilege. The public has no access to chambers, and justice, in the various Divisions of the High Court, not always in respect of the same matters, is administered in chambers. Moreover, anatomical evidence in nullity cases is directed by Act of Parliament to be heard in camera.[17]

Thus, in my opinion, it is not maintainable, as a matter of law, that the fact that this tribunal is directed by its rules to hear in private and to give its findings and order publicly—and only its findings and order publicly—destroys the right to claim absolute privilege.

That brings me to consider the way in which this tribunal functions, and the procedure. I have already deliberately read a great part of the Act of Parliament which deals with the functions, and I have referred to the rules which deal with the procedure. The constitution of the tribunal authorised by Act of Parliament speaks for itself. The functions are judicial functions, not administrative functions. This is not comparable with a meeting concerned with the issue of licences. If there is a prima facie case brought before this tribunal, it has to hear and determine it. This does in a sense affect the status of the solicitor: he is liable to be struck off the roll if he is convicted of unprofessional conduct, and disabled from practising. There is power to fine him, power to make him pay costs, power to administer the oath, power to obtain a subpoena. No doubt that last provision was inserted in order to get over the difficulty as to the attendance of witnesses, which would otherwise only be cured by application to the High Court, as in *Rex* v. *Wiltshire Appeal Tribunal, Ex parte Thatcher*,[18] where the King's Bench Division of the High Court came to the assistance of an inferior court in directing the issue of a subpoena, with the sanction which that involved. The subpoena would, of course, have to be enforced by the High Court. There is further the right of appeal to the High Court. The orders of the committee are enforceable; and there is the further point that the jurisdiction is (as is shown by the passages which I have read from the Act of Parliament) concurrent with the existing High Court jurisdiction: see section 47 (1) and section 50 (2) of the Act.

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[17] Compare Official Secrets Act, 1920.

[18] (1917) 86 L.J.K.B. 121; 32 T.L.R. 657, C.A.

Although I have mentioned the matters of functions and procedure, I think I should add a word of caution, that the plaintiff quite correctly drew attention to some observations which he found in Halsbury's Laws of England (3rd ed., vol. 9, p. 343) which come from the speech of Lord Sankey himself (the judge who had heard the *Copartnership Farms* case [19]) in a Privy Council case, *Shell Company of Australia Ltd.* v. *Federal Commissioner of Taxation*,[20] where, in a matter of this kind, the decisions of Commissioners of Taxation were being considered, Lord Sankey said [21]: " . . . it may be useful to enumerate some negative " propositions on this subject. 1. A tribunal is not necessarily a " court in this strict sense because it gives a final decision. " 2. Nor because it hears witnesses on oath. 3. Nor because two " or more contending parties appear before it between whom it " has to decide. 4. Nor because it gives decisions which affect " the rights of subjects. 5. Nor because there is an appeal to a " court. 6. Nor because it is a body to which a matter is referred " by another body." That, I think, should be referred to, in order to show that I am not giving undue weight to the points as to functions and procedure, which, taken individually, may not be decisive but, taken cumulatively, I think have a very strong bearing on the case.

The next point, the autrefois acquit point, does not, I think, bear examination. It is quite obvious that in the ordinary case where a man is prosecuted for a crime he may well be sued in a civil court in respect of the same offence; and, indeed, the civil hearing is clearly a judicial hearing. That point is illustrated by such a case as *Hollington* v. *F. Hewthorn & Co. Ltd.*,[22] where a man was prosecuted for dangerous driving and was convicted, and then in a civil action arising out of the same facts an attempt was made to get in, as evidence of dangerous driving, his conviction: the Court of Appeal held that that could not be done. That is only an illustration of the point, which has no substance.

I have lastly to mention one further point which I listed as one of the points made by the plaintiff, namely, irregularity in the proceedings. The authorities to which I have already made reference, including *Dawkins* v. *Lord Rokeby* itself,[23] indicate quite clearly that irregularity in the proceedings does not destroy the privilege. If further authority for that is required it is to be

[19] [1918] 2 K.B. 405.

[20] [1931] A.C. 275; 47 T.L.R. 115, P.C.

[21] [1931] A.C. 297.

[22] [1943] K.B. 587; 59 T.L.R. 321; [1943] 2 All E.R. 35, C.A.

[23] L.R. 7 H.L. 744.

found in *Munster* v. *Lamb*[24] and *Scott* v. *Stansfield.*[25] I mention this point because the plaintiff drew our attention to the fact that, this being an inquiry as to the conduct of a solicitor in permitting his clerk to do something wrong, the solicitor's defence was that whatever had gone wrong had gone wrong without his knowing anything about it, and the only question before the committee, it being admitted that there had been an error, was: was the solicitor himself at fault? He was acquitted. In dealing with that issue, the matter to which evidence was directed was the information that the solicitor had. He thereupon told the committee what he himself had been told. There was nothing irregular in that; but even if there had been, on the authorities to which I have made reference it would not have made any difference. The same, of course, applies to the findings and order: if the findings and order, as a document, had contained anything which was not relevant or should not have been contained therein, it would not for that reason (by virtue of the same authorities) have caused the proceedings to lose their character, which was such that the members of the tribunal, as well as the witnesses and all those who appeared before the tribunal, were protected by absolute privilege.

I would dismiss the appeal.

Pearce L.J. I agree with what my Lord has said. It is clear from the cases to which he has referred that absolute privilege is given to proceedings in courts of law in order that judges, advocates and witnesses may perform their respective parts free from a deterrent fear of actions for defamation. This privilege can create hardship for some persons in particular cases, but it is on balance an advantage to the community. For the same reason, the privilege is extended to tribunals which act judicially in a manner similar to courts of justice, but not to merely administrative tribunals. Difficulty may arise in deciding whether a particular tribunal has the characteristics of courts of law sufficiently to entitle it to share their privilege. But, in my view, this tribunal clearly has those characteristics.

This is a tribunal established and authorised by Act of Parliament. Its members are men of standing in the legal profession chosen and appointed by the Master of the Rolls. Its functions are purely judicial and in no wise administrative. It must adjudicate inter partes on the cases brought before it; and its findings and orders affect status. It has power by section 47 of the Act to order costs and to administer fines which go to the Crown. Its procedure is governed by statutory instrument. An appeal by way of rehearing lies to the Divisional Court under a statutory instrument which has effect as if it were a rule of court (section 48 (1)); and its orders are enforceable in the same manner as a judgment or order of the High Court to the like effect (section 49 (2)). It may administer the oath to the witnesses before it (section 46 (6)), and their attendance can be enforced by a subpoena issued out of the Crown Office (section 46 (6)). The purpose of the High Court in lending its power to enforce the attendance of witnesses is to help the judicial process of an inferior court. It would seem anomalous and unfair that the High Court should compel the attendance of a witness before a tribunal, which may administer the oath to him, without extending to that witness the protection of privilege for the evidence which may be elicited from him. Moreover, the jurisdiction exercised by this tribunal is similar to that which from olden days was vested in the Master of the Rolls and the judges, and is still vested in them concurrently with this tribunal (see section 47 (1) and section 50 (2)). In the light of all these considerations I find it impossible to say that it is not exercising its functions in a manner similar to those of a court of justice.

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[24] (1883) 11 Q.B.D. 588, C.A.

[25] (1868) L.R. 3 Ex. 220.

It has been argued that this tribunal does not have such privilege because by virtue of rule 21 it hears all applications in private and only pronounces its findings and orders in public. But that fact, though of great importance, is by no means conclusive, as is shown by the case (to which my Lord has referred) of *Barratt* v. *Kearns*.[26] In chambers procedure and certain other instances, from long-established custom or for more recent reasons, the High Court has hearings which are not in public. In view of the other attributes of this tribunal, the privacy of its hearings does not, in my opinion, differentiate it from courts of law to an extent sufficient to deprive it of the protection of absolute privilege.

I agree that the appeal should be dismissed.

Upjohn L.J. I agree. The plaintiff has argued his case with considerable skill. Much his strongest point, and one which I found impressive, was his submission that a tribunal which is compellable by its rules on all occasions to conduct its hearings in private so far departs from the idea fundamental to British justice, that in general hearings should be in public, that it does not act in a manner similar to that in which courts of justice act, with the result that the tribunal does not satisfy the test laid down by Lord Esher in the passage in the *Royal Aquarium* case[27] which has already been read by Hodson L.J. It is clear, however, from earlier authority, that the courts have not taken that view. Two examples may be mentioned. One was the commission that was appointed by the Bishop of Winchester, an ecclesiastical commission which was to deliberate in private: that is, *Barratt* v. *Kearns*.[28] The second is the leading case of *Dawkins* v. *Lord Rokeby*.[29] A study of the reports both in the House of Lords and in the proceedings in the Exchequer Chamber, does not disclose whether the hearing of the court of inquiry which was set up was in public or in private; but it was a court appointed to consider certain matters and to report to the convening authority. The matter that it had to consider was the fitness for command of an officer in the Coldstream Guards who had been put in close arrest by his superior officer for insubordination. I cannot think for one moment that such an investigation would have been conducted in public. Furthermore, it is quite clear that the report was a private document to be handed only to the convening authority after signature by each member. That case, therefore, I think affords strong support for the view that a tribunal which does not conduct its hearing in public does not necessarily fail to act in a manner similar to a court of justice.

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[26] [1905] 1 K.B. 504.

In general, no doubt, a tribunal having judicial functions to perform should deliberate in public. But there may be good reasons, either in particular cases or indeed in particular classes of cases, where justice demands that the hearing should be in private. The High Court sometimes hears cases in private, and examples have been given by both my Lords, which I need not repeat. In this case one can well understand the reason that may have actuated those responsible for framing rule 21: justice to the solicitor against whom a complaint is made. Some wholly unfounded charge may be preferred against a solicitor by a disappointed client and the publicity of a hearing followed necessarily by some delay while the tribunal puts its finding into writing before the finding is announced might work a serious injustice on the solicitor.

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[27] [1892] 1 Q.B. 431.

[28] [1905] 1 K.B. 504.

[29] L.R. 8 Q.B. 255; L.R. 7 H.L. 744.

In my judgment, this tribunal is entitled to the benefit of the rule applicable to courts of law and may claim absolute privilege.

Appeal dismissed with costs.
Leave to appeal to the House of Lords refused.

Solicitor: *Charles Russell & Co.*

I. G. R. M.

INGRAM AND OTHERS v. LITTLE.

[1957 I. No. 516.]

C. A.
1960
June 27, 28, 29, 30; *July* 28.

Sellers, Pearce and Devlin L.JJ.

Contract—Mistake—Mistake as to identity—Sale of car to purchaser physically present—Purchaser impersonated reputable businessman—Offer and acceptance—To whom was offer addressed—Whether mistake vitiated contract—Whether contract void or voidable.

Three plaintiffs, joint owners of a car, advertised it for sale. A rogue, introducing himself as H., offered to buy it. When he pulled out his cheque book to pay for it, the first plaintiff, conducting the negotiations for the plaintiffs, told him that they expected cash, that they were not prepared to accept payment by cheque, and that the proposed sale was cancelled. The rogue thereupon said that he was P.G.M.H., a reputable businessman, living at an address in Caterham, and having business interests in Guildford. The plaintiffs had never heard of P.G.M.H., but the second plaintiff forthwith went to the local post office, and ascertained from the telephone directory that there was such a person as P.G.M.H., living at the address given by the rogue. The second plaintiff told the first plaintiff what she had learnt and, as the result of that information, they believed that the rogue was P.G.M.H. and decided to let the rogue have the car in exchange for his cheque.

The rogue had nothing whatever to do with the real P.G.M.H., and the rogue's cheque was dishonoured on presentation. Meanwhile, the rogue had sold the car to the defendant, who bought it in good faith.

On a claim by the plaintiffs against the defendant for the return of the car, or, alternatively, damages for its conversion:—

Held (Devlin L.J. dissenting), that where a person physically present and negotiating to buy a chattel fraudulently assumed the identity of an existing third person, the test to determine to whom the offer was addressed was how ought the promisee to have interpreted the promise; applying that test to the present case and treating the plaintiffs as the offerors, the offer was made solely to

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the real P.G.M.H., the rogue was incapable of accepting it, and the plaintiffs' mistake, therefore, prevented the formation of a contract with the rogue; accordingly, the plaintiffs' claim succeeded (post, pp. 53, 55, 61).

Dictum of Viscount Haldane in *Lake* v. *Simmons* [1927] A.C. 487, 500; 43 T.L.R. 417, H.L. applied.

Phillips v. *Brooks Ltd.* [1919] 2 K.B. 243; 35 T.L.R. 470 distinguished.

Hardman v. *Booth* (1863) 1 H. & C. 803 and *Cundy* v. *Lindsay* (1878) 3 App.Cas. 459, H.L. considered.

Per Devlin L.J. There was nothing to rebut the ordinary presumption that the first plaintiff was addressing her acceptance to the person to whom she was speaking. Therefore, there was offer and acceptance in form. In the present case, the rogue's identity was immaterial. His credit-worthiness was material, for the plaintiffs were really concerned with his credit-worthiness, not with his identity, but credit-worthiness in relation to a contract was not a basic fact, and a mistake about it did not vitiate a contract (post, pp. 67, 69).

Decision of Slade J. affirmed.

APPEAL from Slade J.

The following facts are taken substantially from the judgment of Slade J.: The plaintiffs, Miss Elsie Ingram, Miss Hilda Ingram and Mrs. Mary Ann Maud Badger, advertised their Renault Dauphine motor-car, registration number ULJ 101, for sale in the issue of the "Bournemouth Echo" for August 2, 1957, in these terms: "1957 Dauphine, 3,800 miles, sky blue, £725 o.n.o. Park-"stone 4084." As a result of that advertisement they received two inquiries. One was from a man named Gray, who, having made a telephone call to the plaintiffs, was no longer interested. The other was from a swindler who called himself Hutchinson. He telephoned on August 3, 1957, the Saturday before the August Bank Holiday. He spoke to Miss Elsie Ingram, said that he had seen the advertisement and would like to come and see the car. He gave the name of Hutchinson over the telephone, and said that he was staying for the week-end at the Savoy Hotel, Bournemouth. Miss Elsie Ingram told him that she had received another inquiry (the one from the man Gray) whom she thought might come and see the car, and asked whether she could telephone Hutchinson back. Later she telephoned the Savoy Hotel, Bournemouth, asked for Hutchinson and spoke to "the rogue "Hutchinson."

About 2.15 p.m. on August 3 the rogue Hutchinson called at the house where the plaintiffs were living. He was admitted by Miss Hilda Ingram; he told her he was Hutchinson, and Miss

Hilda Ingram accordingly introduced him to her sister Miss Elsie Ingram as Hutchinson. He looked at the car, and asked Miss Elsie Ingram to take him for a run in it, and she did so. During the run he was very talkative. He told her that he came from Surrey. He talked about his family, who he said were then in Cornwall, and he said that his home was at Caterham. At that time he had given no further information, nor had he even given his initials; he was merely Hutchinson.

After the drive they came back to the house and discussed the sale of the car. Hutchinson offered Miss Elsie Ingram, who conducted the negotiations for the plaintiffs, £700 and she refused. After some bargaining he offered £717, which she said she was prepared to accept. The rogue then pulled out a cheque book and she immediately realised that he was proposing to pay £717 by cheque. She told him that she would not in any circumstances accept a cheque, and that she was only willing to sell the car for cash. She told him that so far as she was concerned the deal was finished. She said that she was not prepared to accept a cheque. She had expected cash, and she made as though to walk out of the room.

The rogue started to talk and try to convince her that he was a most reputable person, and then for the first time he gave his initials. He said that he was a P. G. M. Hutchinson. He said that he had business interests in Guildford, and that he lived at Stanstead House, Stanstead Road, Caterham.

Miss Hilda Ingram, who had been in the room, slipped out of the room and after a short time returned. She had gone to the Parkstone post office, which was only about two minutes away from the plaintiffs' house, and had looked in the main telephone directory covering the district of Caterham. In that directory she had seen the entry "Hutchinson, P. G. M., Stanstead House, "Stanstead Road, Caterham 4665," and she believed that that was the man who, at that moment, was with her sister in their house. On her return to the house she told her sister, Miss Elsie Ingram, who was still discussing the proposed sale, that she had checked with the telephone directory at the post office and that there was such a person as P. G. M. Hutchinson living at Stanstead House, Stanstead Road, Caterham. Having received that information, the two sisters decided that they would let the rogue have the car in exchange for the cheque. The decision was reached because they believed that the rogue was the person he said he was. When he gave the cheque, the rogue wrote on the back "P. G. M. Hutchinson, Stanstead House, Stanstead Road, "Caterham."

The rogue was not P. G. M. Hutchinson of Stanstead House, Stanstead Road, Caterham, who had nothing to do with the transaction in question and knew none of the parties connected with it. This gentleman banked with a branch of Lloyds Bank Ltd. in London. The rogue "Hutchinson" opened an account on August 2, 1957, at a branch of the Westminster Bank Ltd. in Guildford with a deposit of £10, acquired a cheque book from which he drew cheques on this account to the extent of nearly £4,000, including the cheque of August 3 for £717 made payable to the plaintiffs, none of which cheques were honoured on presentation. Unlike the P. G. M. Hutchinson he purported to be, he was not a man of substance with an established address in Caterham.

On August 6, 1957, the Tuesday after the bank holiday, a man called Hardy sold the plaintiffs' car to the defendant, Reginald Little, a Blackpool motor dealer, in consideration of an allowance of £605 towards the purchase price of a Ford Consul motor-car sold to him by the defendant for £780 on the same day. Hardy made up the difference by a cash payment to the defendant of £175. The transaction was effected on the defendant's behalf by two of his employees, a salesman and his manager. The rogue disappeared, and had remained untraced. In December, 1957, the defendant sold the plaintiffs' car to another motor dealer in consideration of an allowance of £725 towards the purchase price of a Rover motor-car, bought by him from the other motor dealer on the same occasion. The defendant paid the balance in respect of the Rover car £75 by cash.

The plaintiffs sued the defendant for the return of the car or, alternatively, for damages for its conversion. The plaintiffs contended that there never was a contract between them and the rogue Hutchinson so that he could pass no title in the car to the defendant; alternatively, they contended that if he could pass a good title to the defendant, there was no evidence that he and Hardy were the same person, so that there was no evidence that it was he who sold the car to the defendant; as a further alternative, they contended that the defendant had not bought the car in good faith and without notice of any defect in the sellers' title so that the plaintiffs could still avoid the contract.

The defendant contended that the rogue Hutchinson had a voidable title in the car as the result of a contract with the plaintiffs, that the defendant bought the car in good faith and without notice of any defect in the seller's title from the rogue Hutchinson, and that the defendant thereby obtained a good title to the car under section 23 of the Sale of Goods Act, 1893.

The trial began at Winchester, where the evidence was heard, and the case was then adjourned to London for argument and judgment. The judge held that the rogue Hutchinson and Hardy were one and the same person, and that the defendant had bought the plaintiffs' car in good faith and without notice of any defect in the seller's title from the rogue Hutchinson, but he held that the plaintiffs' mistake as to the identity of the person with whom they were dealing prevented the formation of a contract with the rogue, so that he could pass no title in the car to the defendant; judgment was, therefore, given for the plaintiffs for £720, the agreed value of the car, as damages for conversion. The defendant appealed.

Stephen Chapman Q.C. and *Ronald Hopkins* for the defendant. The issue is whether the transaction between the plaintiffs and the rogue Hutchinson passed a title to the car, albeit a voidable title, which was capable of being transferred to the defendant, or whether the transaction was vitiated by a fundamental mistake and conferred no title at all. The judge held that there was such a mistake so that no title to the car had passed; the judgment being founded on Professor Goodhart's article, "Mistake as to "identity in the law of contract" (1941), 57 L.Q.R. 228.

There are three main submissions. First, the bargain was struck and the contract made at the moment the parties agreed upon the price, that being the sole matter to be agreed after the car had been seen, and, under section 18, rule 1, of the Sale of Goods Act, 1893, prima facie the property in the car passed to the rogue Hutchinson. There was then a concluded contract for the sale of the car, payment to be made by cash. All that took place thereafter was a discussion as to whether the plaintiffs would be prepared to accept a cheque. That discussion related to the performance of the contract, not to its formation.

Secondly, assuming that the bargaining as to whether a cheque should be taken was part of the making of the contract, a mistake as to the identity of the parties in a case where the parties bargain face to face can only vitiate the contract where it is of the essence of the contract that one party should be a particular person. The test for determining whether the contract is a nullity does not depend on the rules of offer and acceptance, but on whether the contract is a personal contract. In the present case, it was not vital to the creation of the contract that the purchaser of the car should be a particular person. The identity of the purchaser was quite immaterial to the plaintiffs.

Thirdly, in any event, the negotiations for the sale of the car had nothing to do with whether the rogue Hutchinson was a particular person, for the plaintiffs had never heard of him. By giving himself a false name, he gave himself a false label and false attributes, but the false representations were as to his quality only; he did not lead the plaintiffs to believe that they were dealing with someone else known to them.

The conclusions in Professor Goodhart's article are that *Phillips* v. *Brooks Ltd.*[1] was wrongly decided; that the test propounded by Pothier (Traité des Obligations (1803), s. 19, p. 13) is incorrect; and that the clue to the problem of mistake is to be found in the rules of offer and acceptance. The question, according to Professor Goodhart, is simply a matter of the interpretation of the offer. Previously, it had always been accepted that mistake was a separate compartment of the law of contract, and the question was whether the parties were ad idem or whether they were talking about different fundamental matters: see *Raffles* v. *Whichelhaus*,[2] where the mistake was one of subject-matter. Where identity was in question, the Pothier test has always been accepted as the correct one. Where the contract is personal in the sense that the person with whom one is willing to contract is a material element of the contract, an error as to the identity of that person is a fundamental mistake which vitiates the contract. If an impresario engages someone to sing the part of Siegfried, it is vital that the singer should be the particular artist with whom the impresario intended to contract and not an impostor. But if X goes to Paddington station and, saying that he is Professor Goodhart, asks for and is given a ticket to Oxford, there is a contract even if he is not Professor Goodhart. The vital classification is whether the contract is a personal or impersonal contract. The fact that credit is given does not alone convert a contract into a personal contract, because it is always assumed by one party that the other will be capable of performing his obligations.

Professor Goodhart's article rests on two false premises. First, that the identity of the parties is a term of every contract, and, secondly, that the state of mind of the offeree is the decisive criterion as to whether there is a contract. The identity of the parties is not a term of every contract. In a contract between A and B, A and B are the parties to the contract, but it is not a term of the contract that A shall be A; the term of the contract is that A shall do something. The parties to the contract are the two uprights, but the bargain is the cross-bar between them. If it were a term of the contract that A shall be A, then a birth certificate would have to be produced to verify that A is A. The premise is completely fallacious. Identity is, however, a material term of some contracts, and it is only in those that the doctrine of mistake as to identity operates. Secondly, it is said that if an offeree knows that an offer is not intended for him, he is incapable of accepting it. If that were right, it is tantamount to saying that in every case where a fraud is perpetrated it would operate as a fundamental mistake, because the fraudulent party would know that the offer was not intended for him. It is quite clear law that the fact that a party is misled is nihil ad rem: see *Smith* v. *Hughes*.[3] In any case this test begs the question: what the offeree knows is that the offer is made and intended to be made to himself, even if he has caused it to be made by a false statement as to who he is. The rules of offer and acceptance may be helpful in solving some cases, but they do not provide a complete solution to the problem of identity in the law of mistake.

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[1] [1919] 2 K.B. 243; 35 T.L.R. 470.

[2] (1864) 2 H. & C. 906.

These two false premises in Professor Goodhart's article lead to the test which he propounds, and which has been incorporated by the judge in his judgment—how ought the promisee to have interpreted the promise. *Hardman* v. *Booth*[4] was relied on in support of that test, but that case depended on the law of agency; all it decided was that where a person represents himself to be an agent, and he has no authority to contract, there is no contract. The remedy of the aggrieved party is to sue the agent for breach of warranty of authority.

The Pothier test has always been accepted: see *per* Fry J. in *Smith* v. *Wheatcroft*,[5] *per* A. L. Smith L.J. in *Gordon* v. *Street*,[6] *per* Horridge J. in *Phillips* v. *Brooks Ltd.*,[7] *per* Viscount Haldane in *Lake* v. *Simmons*,[8] *per* McCardie J. in *Said* v. *Butt*,[9] *per* Lawrence J. in *Dyster* v. *Randall & Sons*,[10] *per* Tucker J. in

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[3] (1871) L.R. 6 Q.B. 597.

[4] (1863) 1 H. & C. 803; 158 E.R. 1107.

[5] (1878) 9 Ch.D. 223, 230.

[6] [1899] 2 Q.B. 641, 647; 15 T.L.R. 445, C.A.

[7] [1919] 2 K.B. 243, 248.

[8] [1927] A.C. 487, 501; 43 T.L.R. 417, H.L.

[9] [1920] 3 K.B. 497, 502; 36 T.L.R. 762.

[10] [1926] Ch. 932, 939.

Sowler v. *Potter*[11] and *per* Hallett J. in *Dennant* v. *Skinner and Collom.*[12]

Here it was the rogue Hutchinson who made the offer and the plaintiffs who accepted it. The judge treated the plaintiffs as the offerors, but strictly it was the rogue's counter-offer which was accepted by the plaintiffs. In many cases it is almost impossible to know who is making the offer, for example, the ticket cases. This shows that the Goodhart test is not a satisfactory one; it can only assist where it is abundantly clear who makes the offer and to whom, as in *Boulton* v. *Jones.*[13] The Goodhart test is irreconcilable with *King's Norton Metal Co. Ltd.* v. *Edridge, Merrett & Co. Ltd.*[14]; on the Goodhart test the only person capable of accepting the offer was Hallam & Co., so that, if that firm did not exist, there was a fortiori no contract; yet a contract was held to exist, the false name assumed by Wallis amounting to no more than a false label.

The name and address given by the rogue Hutchinson were merely labels. There can only be an identification of a person when there is some background knowledge of him and the use of a name links up with what is already known of him. So in *Cundy* v. *Lindsay*[15] the mistake was as to a particularly well-known firm. Unless there is some background knowledge, the mere giving of a name and an address does not create an identification of an existing personality. In any event, the mistake in the present case was as to the rogue Hutchinson's attributes. The plaintiffs were not concerned to verify his identity; if they were, they could have asked to see his driving licence, correspondence addressed to him or even a visiting card. All that they wanted was to be assured of his financial standing, not that he was Hutchinson. Assume that the rogue Hutchinson's cheque could have been met, but that someone else offered more money for the car, it is inconceivable that the plaintiffs could say that there was no contract and be able to sell the car for the higher price. There was nothing in the negotiations to suggest that it was in any sense vital that the false label of the rogue Hutchinson should correspond with reality.

It is only where there is a false introduction of a third party who is known to the deceived party as an existing person, so that an impact is produced in the deceived party's mind that he is

[11] [1940] 1 K.B. 271, 275; 56 T.L.R. 142; [1939] 4 All E.R. 478.

[12] [1948] 2 K.B. 164, 166; [1948] 2 All E.R. 29.

[13] (1857) 2 H. & N. 564.

[14] (1897) 14 T.L.R. 98, C.A.

[15] (1878) 3 App.Cas. 459, H.L.

dealing only with the third party, that there can be a fundamental mistake as to identity. If the third party is fictitious, the mistake is merely a mistake of quality: *King's Norton Metal Co. Ltd.* v. *Edridge, Merrett & Co. Ltd.*[16] So, too, if, as in the present case, the third party is unknown to the deceived party, so that the mention of the third party's name means nothing at all to the deceived party.

Phillips v. *Brooks Ltd.*[17] has always been accepted as correct: see *per* Hallett J. in *Dennant* v. *Skinner and Collom*,[18] where it was followed; and although it was the subject of much argument in *Lake* v. *Simmons*,[19] there is no suggestion in the latter case that it was wrongly decided. *Lake* v. *Simmons* itself does not bear directly on the present problem, because it turned on the construction of the insurance policy. Benjamin on Sale, 8th ed. (1950), p. 107, accepts *Phillips* v. *Brooks Ltd.*[20] as correct. It has been suggested that the Scottish case of *Morisson* v. *Robertson*[21] conflicts with *Phillips* v. *Brooks Ltd.*, but *Morisson's* case was simply a case of agency, which followed *Hardman* v. *Booth.*[22] *Phillips* v. *Brooks Ltd.* was a stronger case than the present case, because the name Sir George Bullough was known to the jeweller. Apart from that, the present case is indistinguishable from *Phillips* v. *Brooks Ltd.* and should be decided in the same way.

Hopkins following. The real question when parties are contracting inter praesentes is whether the impostor has given himself a false description or whether he has assumed a false personality. In the present case that might be a question of fact, but because the judge proceeded on false premises he never posed to himself the real question. The element of pre-knowledge is of the greatest, if not, of decisive importance in determining whether a statement is no more than a false description, or whether it amounts to the assumption of a false personality. The distinction is between clothing oneself with qualities that one does not possess or with a false identity. If the judge had considered the right question, the proper answer would have been that the rogue Hutchinson's description of himself amounted to no more than a false label. The conclusion in the present case would be a fortiori to *Phillips* v. *Brooks Ltd.*,[23] where the person misrepresented was a well-known member of society.

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[16] 14 T.L.R. 98, C.A.

[17] [1919] 2 K.B. 243.

[18] [1948] 2 K.B. 164, 169.

[19] [1927] A.C. 487, H.L.

[20] [1919] 2 K.B. 243.

[21] 1908 S.C. 332.

[22] 1 H. & C. 803.

[23] [1919] 2 K.B. 243.

Ingram Poole for the plaintiffs. If the Pothier test were part of English law its application might well involve investigation into the differences between substance and quality, or those between personality and attributes, not to speak of other difficulties arising out of the words "consideration of the person" and "enters as an element." The wording covers attributes as well as identity as a whole. The classification of contracts into personal and impersonal contracts, although pertinent to such questions as the right to assign, has no bearing on this case. Every contract is capable of having a personal element, but the law is not concerned with the subjective desires of the contracting parties when it seeks to ascertain whether a contract exists. The test is an objective one—whether a particular person, on a construction of what took place, can be said to have displayed the intention to contract with another. But where that other knows the true facts there is no room for a finding that on application of the usual test there was a concluded contract. One step in the inquiry in a case where two persons were present together in a room is not progressed by posing a question in the form: "Did she think she was contracting with someone else?" The appropriate way here to express the question is: "Did she believe "that the person present in the room and the man living at "Stanstead House with whom she was minded to contract on "certain terms were one and the same person?" It was only when they had independent evidence of the existence of P. G. M. Hutchinson and had been led to think that the rogue in the room was the same person as the real P. G. M. Hutchinson that they were prepared to proceed with the sale.

The judge in treating the plaintiffs as the offerors may or may not have been strictly correct, but it is immaterial whether the plaintiffs are regarded as making an offer which the rogue Hutchinson could not accept, or whether they are regarded as the acceptors who did not intend to accept the offer of a cheque from him. The principle remains the same; where A makes an offer to B, C cannot accept it or acquire any rights under it. This is a fundamental rule of offer and acceptance basic to the law of contract. Pollock C.B. stated the rule thus in *Boulton* v. *Jones* [24]: "It is a rule of "law, that if a person intends to contract with A, B cannot give "himself any right under it." That is the true proposition, subject to viewing the intention of the parties objectively. The only test as to a statement of intention that is recognised by

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[24] (1857) 2 H. & N. 564, 565.

English law is what did it mean to the offeree, assuming that he was a reasonable man. In *Upton-on-Severn R.D.C.* v. *Powell*[25] the offer to the fire brigade had to be interpreted in the way that a reasonable man would construe it. The test is entirely objective: see *per* Lord Wright in *Norwich Union Fire Insurance Society* v. *William H. Price Ltd.*[26] If someone knows, therefore, that an offer is not intended for him, he is unable to accept it. The circumstances of the present case show that the offer was addressed to the real Hutchinson, and that the rogue Hutchinson knew that the offer was not meant for him. Accordingly, he could not accept it. Acceptance of the Pothier test would appear to be inconsistent with the objective test, but in any event the plaintiffs' case here falls within, and under, the Pothier test. Personal considerations are an important element of the contract where what is involved is the financial stability of a person. At first glance the sale of theatre tickets is a contract involving no personal consideration, yet such was held void in *Said* v. *Butt.*[27] In the present case, the personality of the other party was a material element of the contract. The plaintiffs could therefore succeed quite apart from the test propounded by Professor Goodhart, and even if *Phillips* v. *Brooks Ltd.*[28] was rightly decided. That case depended on the finding of fact that the jeweller intended to contract with the customer in the shop whoever he was. But the judge found in the present case that the plaintiffs did not intend to contract with the rogue Hutchinson.

It is submitted in particular regarding *Phillips* v. *Brooks Ltd.*[28] first, that if Horridge J. came to the conclusion that there can be no operative mistake as to identity inter praesentes, then that decision was wrong and contrary to authority: *Hardman* v. *Booth*[29] and now *Lake* v. *Simmons.*[30] That this was in fact the conclusion is the view taken in the Goodhart article, and there is strong support to be gathered from the report for the drawing of this inference. If the headnote correctly states the decision, then the decision is wrong. In so far as Horridge J. adopted the circular reasoning to be found in *Edmunds* v. *Merchants Despatch Co.*,[31] this is to be regretted. Secondly, the statement in the headnote is, in any event, not the law having regard to *Lake* v. *Simmons.* Thirdly, the decision provides no warrant for the proposition that Pothier is part of English law. The second leg of the Pothier statement was never expressed to be the basis of the decision, although the first leg of the statement was held in terms not to govern the situation. Fourthly, it appears that Horridge J. so held for two reasons: (a) because (as he found) "the seller intended to contract with the person present and "there was no error as to the person with whom he contracted"; (b) because *Smith* v. *Wheatcroft* [32] (where Pothier was quoted) was an action for specific performance, and misrepresentation would have been an answer to enforcement. Fifthly, the true ratio decidendi is not apparent, but if it is to be looked at simply as a decision depending on its special facts, namely, that the jeweller intended to sell to the person in the shop, whoever he was, then Slade J. in the present case could have found in favour of the plaintiffs without that involving a refusal to follow *Phillips* v. *Brooks Ltd.* It has been suggested as explanatory of the decision that the bargain in *Phillips* v. *Brooks Ltd.* was made before the misrepresentation, which only went to payment: see *per* Viscount Haldane in *Lake* v. *Simmons*.[33] No reliance is placed on this explanation, because such a notional separation of the passing of property and payment for it in an over-the-counter sale would appear to be inconsistent with principle: see *Pharmaceutical Society of Great Britain* v. *Boots Cash Chemists* (*Southern*) *Ltd.*[34] Moreover, such a reason for his decision was never advanced by Horridge J. See particularly the first paragraph of his judgment. Sixthly, if *Phillips* v. *Brooks Ltd.*[35] is a right decision on its particular facts, then the present case is to be distinguished because: from the beginning the fraudulent person claimed to be Hutchinson; the plaintiffs here made their attitude plain, as shown on the failure of the first attempt at contract in the absence of cash; no ostensible agreement of sale was achieved until after the fraudulent person had put forward as the contracting party an existing person actually living at an address stated; if the property in this car was ever to pass, it could on any showing only do so after the plaintiffs had accepted that person as the contracting party.

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[25] [1942] 1 All E.R. 220, C.A.

[26] [1934] A.C. 455, 463; 50 T.L.R. 454, P.C.

[27] [1920] 3 K.B. 497.

[28] [1919] 2 K.B. 243.

[29] 1 H. & C. 803.

[30] [1927] A.C. 487.

[31] (1883) 135 Mass. 283.

Phillips v. *Brooks Ltd.*[35] was referred to with approval in *Dennant* v. *Skinner and Collom*,[36] but that case is distinguishable,

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[32] 9 Ch.D. 223.

[33] [1927] A.C. 487, 500.

[34] [1952] 2 Q.B. 795; [1952] 2 T.L.R. 340; [1952] 2 All E.R. 456; affd. [1953] 1 Q.B. 401; [1953] 2 W.L.R. 427; [1953] 1 All E.R. 482, C.A.

[35] [1919] 2 K.B. 243.

[36] [1948] 2 K.B. 164.

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for it was based on the passing of the property in goods under the particular law relating to auction sales.

As to the argument that there was a concluded contract before the rogue Hutchinson offered to pay by cheque, it is submitted that this is not tenable. However, if there was, it was immediately repudiated by the rogue Hutchinson in offering a cheque, and the repudiation was accepted by the plaintiffs. There was not such a contract because of a fundamental mistake arising out of the requirement as to cash on the one side and to offer a cheque on the other, or, alternatively, it was an implied term of the transaction that payment would be by cash, so that the offer of a cheque was a counter-offer which involved the rejection of the original offer, as in *Hyde* v. *Wrench*.[37]

The fact that a person is physically present and identifiable by sight and hearing cannot mean by itself that the other party always intends to contract with the person physically present. Is it possible to say that if the negotiations had taken place on the telephone, there would have been a material difference? Could the mere withdrawal of the physical presence of the rogue Hutchinson alter the legal situation? Sir Frederick Pollock rightly said that seeing a man does not tell you who he is. The primary question in *Lake* v. *Simmons* [38] was whether there was a contract of bailment with the supposed wife of Van Der Berg; there was no contract of bailment in that case because there was no real consent to the bargain; her claim to be someone she was not vitiated the whole transaction. [Reference was made to Sir Carleton Kemp Allen's article, "Mistaken Identity" (1928) 44 L.Q.R. 72, 75.] *Lake* v. *Simmons* is decisive of the present case, because if the contract of bailment there was void, the apparent contract of sale in the present case must be void too. The primary question before the court in that case and in the present case was identical. So, too, in *John Rigby (Haulage) Ltd.* v. *Reliance Marine Insurance Co. Ltd.*[39] there was no contract with the thief who pretended to be the driver of a subcontractor, although he was physically present at the time of the purported contract: see *per* Jenkins L.J.[40] *King's Norton Metal Co. Ltd.* v. *Edridge, Merrett & Co. Ltd.*[41] underlines the importance of an existing third person. A. L. Smith L.J.[42]

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[37] (1840) 3 Beav. 334.

[38] [1927] A.C. 487, H.L.

[39] [1956] 2 Q.B. 468; [1956] 3 W.L.R. 407; [1956] 3 All E.R. 1, C.A.

[40] [1956] 2 Q.B. 468, 483.

[41] 14 T.L.R. 98, C.A.

[42] Ibid. 99.

referred to the distinction between not knowing who a person is when contracting with him, and thinking that he is some existing third person. That distinction emphasises the force of the plaintiffs' case. They mistakenly believed that the man in the room and the man at Stanstead House were one and the same person. Viewing their actions in an objective manner, it is clear that they intended to deal and to deal only with a particular person—the man living at Stanstead House.

Much stress has been placed on the fact that until the discussions about the cheque the plaintiffs had never heard of the existence of the real Hutchinson. But that factor cannot be decisive, because once they had verified the existence of the real Hutchinson and assumed that they were dealing with the particular person living at Stanstead House, there was produced in their minds a false impression about the identity of the actual person in the room—they believed that he was the man they knew to be living at Stanstead House. It would make no difference to their wrong impression had they met the real Hutchinson on previous occasions or had heard of him previously. He was just as real a person after the inquiry at the post office as if they had known him. The plaintiffs, induced by the fraudulent person into the belief that he was the real Hutchinson, made an offer which by their actions they made quite clear was only addressed to the real Hutchinson—and he alone was capable of accepting it.

If the plaintiffs are wrong on the main question, they desire to challenge the two findings of the judge in the defendant's favour—first, that the rogue Hutchinson was the same man as the man called Hardy who sold the car to the defendant; and, secondly, assuming that he was the same man, that the defendant had bought the car in good faith. The defendant relies on section 23 of the Sale of Goods Act, 1893, whereby a seller who has a voidable title can pass a good title to a bona fide purchaser for value before the sale is avoided. To be within the section the defendant must prove that he bought from someone with a voidable title, which in the present case is the rogue Hutchinson. On the evidence it is not shown that the rogue Hutchinson was the same person as Hardy; there is simply no evidence on the point at all, and since the burden of proof rests on the defendant he has not discharged the onus. The judge based his finding that they were one and the same person on an inference; but an inference can only be drawn from some kind of evidence. The judge's view was really no more than mere conjecture. It was just as consistent with the evidence that Hardy stole the car from the rogue Hutchinson and sold it to the defendant.

Even if it was the rogue Hutchinson who sold the car to the defendant, the latter did not buy it in good faith. It is conceded that the burden of proving lack of good faith rests on the plaintiffs: *Whitehorn Brothers* v. *Davison.*[43] But a failure to make inquiries where the circumstances of the sale are suspicious justifies a finding of lack of good faith: see *per* Vaughan Williams L.J. in *Whitehorn Brothers* v. *Davison*,[44] *per* Lord O'Hagan[45] and Lord Blackburn[46] in *Jones* v. *Gordon.* There was a number of factors which should have put the defendant on inquiry, and the absence of inquiry must lead to the conclusion that the defendant, through his servants who carried out the sale on his behalf, deliberately shut his eyes to the true situation. Hardy sold the car in Blackpool, having a log book which showed that the first plaintiff was the owner of the car and that she lived on the south coast. The defendant bought it for £605, over £100 less than the rogue Hutchinson had purported to pay for it, and sold it for £760 a few months later—a large profit for a deal which was completed in about 40 minutes with a stranger, who said that he was on holiday in Blackpool and gave his permanent address as being in Hull. The defendant's servants did not even look at the log book or ask for any receipt to show that Hardy had bought the car. Had they looked at the log book, they would have seen the first plaintiff was the owner of the car. Failure to make inquiries regarding a log book if it contains the name of a third person as owner of the car is evidence of lack of good faith: see *per* Lush J. in *Heap* v. *Motorists Advisory Agency Ltd.*,[47] *per* Denning L.J. in *Bishopsgate Motor Finance Corporation Ltd.* v. *Transport Brakes Ltd.*[48] and *per* Morris L.J. in *Central Newbury Car Auctions Ltd.* v. *Unity Finance Ltd.*[49] The circumstances of the sale must have created abundant suspicion in the minds of any honest dealer.

Stephen Chapman Q.C. in reply.

[SELLERS L.J. You need not trouble about the plaintiffs' cross-appeal against the judge's findings.]

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[43] [1911] 1 K.B. 463, C.A.

[44] Ibid. 476, 478.

[45] (1877) 2 App.Cas. 616, 625, H.L.

[46] Ibid. 628, 629.

[47] [1923] 1 K.B. 577, 591; 39 T.L.R. 150.

[48] [1949] 1 K.B. 322, 337, 338; 65 T.L.R. 66; [1949] 1 All E.R. 37, C.A.

[49] [1957] 1 Q.B. 371, 397; [1956] 3 W.L.R. 1068; [1956] 3 All E.R. 905, C.A.

The judge's finding of fact that the plaintiffs did not intend to contract with the rogue Hutchinson was vitiated by the approach which he made as a matter of law. He founded himself on the false premises in Professor Goodhart's article, and applied the false test there propounded. The essence of the bargain was that the plaintiffs wanted cash, not that they were going to contract only with a particular individual. When cash was not forthcoming, all that they were concerned with was the financial stability of the man facing them in the room. The question is whether the essential intention of the plaintiffs was to bargain with the man in the room, or whether that prima facie presumption was overriden by something more fundamental, that is, that the man in the room should have a specific identity. Where there are prima facie two persons bargaining about the transfer of property, there must be a heavy onus on either of them to establish that what has objectively emerged has been vitiated by something which is not apparent to third parties, and which is based on evidence that cannot be objectively tested. In the present case, it was not vital to the creation of the contract that the other party should be a particular person; the plaintiffs were only concerned that he should have credit.

Cur. adv. vult.

July 28. The following judgments were read.

SELLERS L.J. In August, 1957, the plaintiffs were the joint owners of a Renault Dauphine motor-car, ULJ 101.

On August 3, 1957, the Saturday before the August Bank Holiday of that year, in a transaction with a man not inappropriately called "the rogue Hutchinson" by the judge, the plaintiffs parted with the car to him. By August 6 the car was in Blackpool and there was a purported sale of it to the defendant by the rogue, as the judge found, then using the name Hardy.

If the property in the car had passed on August 3 to "the "rogue Hutchinson," whatever his true name and identity was, then the defendant would have obtained a good title on the judge's findings that Hutchinson and Hardy were but one person, "the rogue Hutchinson," and that the defendant through his servants bought the car in good faith and without notice of the seller's defect in title.

Slade J. held that no contract had in fact been entered into between the plaintiffs and "Hutchinson" and that no title had passed to him, and, therefore, none was transferred to the defendant, and he gave judgment for the plaintiffs for £720, the agreed value of the car, as damages for conversion.

The defendant has appealed against this decision, alleging that the judge was wrong both in law and in fact in so holding and it will be necessary to examine the facts found as well as the law applied.

By a cross-notice of appeal, the plaintiffs have challenged the findings of the judge that the man, who sold the car to the defendant, was the same man as the man who had obtained it from them and that the defendant bought the car in good faith. It was submitted to us that the judge's findings were unjustified, but I agree so fully with what the judge has said and held on both these matters [1] that I do not review the evidence or the argument afresh on the plaintiffs' contentions. The defendant and his servants, like so many who buy and sell secondhand motor-cars, might have been more astute and more careful, but it requires more than that to justify a finding of bad faith. The inference that there had been no transaction with the car intervening

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[1] The following are the relevant passages of the judgment of Slade J. on these matters: "I am now going "to decide two questions which, on "the view of the present case that I "take, cannot affect the result here- "after. The first one is . . . was "Hutchinson Hardy? I find as a "fact that he was. I draw that in- "ference from evidence which appears "to be almost overwhelming, and it is "shortly this. Hutchinson obtained "possession of the Renault Dauphine "on the Saturday before the bank "holiday in August, 1957, in Poole "in Dorsetshire. He sold it to the "defendant the following Tuesday "afternoon in Blackpool. It was the "same car, registration number ULJ "101. He obtained the log book from "Miss Elsie Ingram, and he handed "over that same log book on the "following Tuesday. It matters not "in the least, as I understand it, "whether Hutchinson was Hardy, or "whether Hardy was someone acting "with the authority of Hutchinson— "that is to say, acting as agent of "Hutchinson to dispose of the car. "I find as a fact that they were one "and the same person. If they were "not, it can mean only that in that "short period from the afternoon of "Saturday, August 3, 1957, until the "afternoon of Tuesday, August 6, "1957, there must have been some "intermediate disposition of the car "unless, of course, as I say, Hut- "chinson said to one of his fellow "rogues: 'I do not want to appear "'in this again. You take this car "'and sell it on my behalf.'

"The second question is this. If "section 23 of the Sale of Goods Act, "1893, should arise hereafter, I have "to decide whether the defendant "bought the Renault Dauphine on "Tuesday, August 6, 1957, in good "faith and without notice of the defect "in Hardy's title. . . . I have seen "Quinn [one of the defendant's sales- "men] and Bickerstaffe [the defen- "dant's manager] in the witness-box. "I think they were both honest men, "and I find as a fact that they did "accept the Renault Dauphine and "£175 in cash in return for the defen- "dant's 1956 Ford Consul worth £780, "both in good faith and without notice "of any defect in Hardy's title to the "Renault Dauphine car."

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between that with the plaintiffs and that with the defendant seems reasonable and probable, and, therefore, sufficiently established as the judge has held.

The decision in the present case turns solely on whether "Hutchinson" entered into a contract which gave him a title to the car which would subsist until it was avoided on the undoubted fraud being discovered.

There was no evidence from the other alleged contracting party, "Hutchinson," the alleged buyer, for he is apparently unknown and untraced, but the judge found the plaintiffs' evidence satisfactory and reliable. [His Lordship then stated the facts as found by Slade J. and continued:]

During the conversation, from which a contract, if any, has to be derived, the rogue "Hutchinson" knew he was not the person the plaintiffs believed him to be and to whom alone they made their offer to sell the car and to whom alone they intended to give possession of it in exchange for his cheque.

"Hutchinson" knew that the offer to sell the car in exchange for a cheque was not made to him as he was, but only to an existing person whom he represented himself to be. If the plaintiffs are to be regarded as the acceptors of "Hutchinson's" offer to pay by cheque, he knew full well that it was not his cheque they were accepting but the cheque of the man they thought he was by reason of his persuasion and deceit.

The judge found that Miss Elsie Ingram intended to part not merely with possession but with the property in the car, but that she did so believing that the person to whom she was selling the car was P. G. M. Hutchinson of Stanstead House, Stanstead Road, Caterham, with a number in the telephone directory, and he further held that, if the entry in the telephone directory had not been confirmed by Miss Hilda Ingram, the two sisters would not have accepted the cheque in payment or parted with the car.

If "Hutchinson" had paid cash for the car, then it seems clear that there would have been a concluded and unimpeachable transaction in which the identity and financial stability of the buyer would have been of no moment. This is not a case where the plaintiffs wished to withhold their car from any particular person or class of persons. Their desire, made quite obvious in the negotiations, was to ensure that they received payment and, unless cash was paid, the person with whom they were dealing was of major importance truly only as to his credit worthiness and this fact was equally clear to "Hutchinson" from the course which the negotiations took.

It does not seem to me to matter whether the right view of the facts is, as the judge has held and as I would agree, that there was no concluded contract before the cheque book was produced and before the vital fraudulent statements were made or that there was a concluded contract which "Hutchinson" at once repudiated by refusing to pay cash and that this repudiation was accepted by the plaintiffs and the transaction was then and there at an end. The property would not have passed until cash had been paid and it never was paid or intended to be paid.

Was there a contract of sale subsequently made which led to the plaintiffs taking "Hutchinson's" cheque and in exchange for it handing over the car and its log book?

The judgment held that there never was a concluded contract, applying, as I understand it, the elementary factors required by law to establish a contract.

The judge, treating the plaintiffs as the offerors and the rogue "Hutchinson" as the offeree, found that the plaintiffs in making their offer to sell the car not for cash but for a cheque (which in the circumstances of the Bank Holiday week-end could not be banked before the following Tuesday, August 6, 1957) were under the belief that they were dealing with, and therefore making their offer to, the honest P. G. M. Hutchinson of Caterham, whom they had reason to believe was a man of substance and standing.

"Hutchinson," the offeree, knew precisely what was in the minds of the two ladies for he had put it there and he knew that their offer was intended for P. G. M. Hutchinson of Caterham and that they were making no offer to and had no intention to contract with him, as he was. There was no offer which he "Hutchinson" could accept and, therefore, there was no contract.

The judge pointed out that the offer which the plaintiffs made was one which was capable of being accepted only by the honest P. G. M. Hutchinson of Caterham and was incapable of acceptance by "Hutchinson."

In all the circumstances of the present case I would accept the judge's findings. Indeed the conclusion so reached seems self-evident.

Is the conclusion to be held wrong in law? If it is, then, as I see it, it must be on the sole ground that as "Hutchinson" was present, albeit making fraudulent statements to induce the plaintiffs to part with their car to him in exchange for his worthless cheque and was successful in so doing, then a bargain must

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have been struck with him personally, however much he deceived the plaintiffs into thinking they were dealing with someone else.

Where two parties are negotiating together and there is no question of one or the other purporting to act as agent for another, and an agreement is reached, the normal and obvious conclusion would no doubt be that they are the contracting parties. A contrary finding would not be justified unless very clear evidence demanded it. The unfortunate position of the defendant in this case illustrates how third parties who deal in good faith with the fraudulent person may be prejudiced.

The mere presence of an individual cannot, however, be conclusive that an apparent bargain he may make is made with him. If he were disguised in appearance and in dress to represent someone else and the other party, deceived by the disguise, dealt with him on the basis that he was that person and would not have contracted had he known the truth then, it seems clear, there would be no contract established. If words are substituted for outward disguise so as to depict a different person from the one physically present, in what circumstances would the result be different?

Whether the person portrayed, by disguise or words, is known to the other party or not is important in considering whether the identity of the person is of any moment or whether it is a matter of indifference. If a man said his name was Brown when it was in fact Smith, and both were unknown to the other party, it would be difficult to say that there was any evidence that the contract was not made and intended to be made with the person present. In *King's Norton Metal Co. Ltd.* v. *Edridge, Merrett & Co. Ltd.*[2] one Wallis fraudulently described himself as Hallam & Co., making it appear a substantial firm with a large factory. The court held that the use of an assumed name by the buyer did not prevent a finding that the plaintiffs, the sellers of some brass rivet wire, had contracted with him.

But personal knowledge of the person fraudulently represented cannot, I think, be an essential feature. It might be a very strong factor but the qualities of a person not personally known might be no less strong. If a man misrepresented himself to be a Minister of the Crown or a stockbroker, confidence in the person so identified might arise although the individual so described was wholly unknown personally or by sight to the other party.

It would seem that there is an area of fact in cases of the

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[2] (1897) 14 T.L.R. 98, C.A.

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type under consideration where a fraudulent person is present purporting to make a bargain with another and that the circumstances may justify a finding that, notwithstanding some fraud and deceit, the correct view may be that a bargain was struck with the person present, or on the other hand they may equally justify, as here, a finding the other way.

Some of the difficulties and perhaps confusion which have arisen in some of the cases do not, in my view, arise here.

If less had been said by the rogue, and if nothing had been done to confirm his statements by Miss Hilda Ingram, who communicated what she had learnt to Miss Elsie who was doing the main negotiation, the result might have been different, for the sellers' concern about the stability and standing of the buyer might not have been revealed and it might have been held that an offer in such circumstances was to the party present, whatever his true identity would be.

In *Phillips* v. *Brooks Ltd.*[3] the rogue North had apparently been in the shop some time inspecting goods which were brought and displayed for sale to him without any regard to his identity—he was a "customer" only. The judgment of Horridge J. is, as I read it, based on a finding of fact that Phillips intended to deal with North as a customer. Viscount Haldane, in *Lake* v. *Simmons*,[4] has taken the view that the case could be explained on the ground that the fraudulent misrepresentation was not made until after the parties had agreed upon a sale.

That opinion has been criticised, mainly, I think, by academic writers, but if, as must be conceded, it is a possible view, and as *Phillips* v. *Brooks Ltd.*[5] has stood for so long and is, as I think, a decision within an area of fact, I would not feel justified in saying it was wrong.

It is not an authority to establish that where an offer or acceptance is addressed to a person (although under a mistake as to his identity) who is present in person, then it must in all circumstances be treated as if actually addressed to him. I would regard the issue as a question of fact in each case depending on what was said and done and applying the elementary principles of offer and acceptance in the manner in which Slade J. directed himself.

The judgment quotes extensively from the article by Dr. Goodhart, the editor of the Law Quarterly Review, called

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[3] [1919] 2 K.B. 243; 35 T.L.R. 470.

[4] [1927] A.C. 487, 501; 43 T.L.R. 417, H.L.

[5] [1919] 2 K.B. 243.

"Mistake as to identity in the Law of Contract" (1941) 57 L.Q.R. 228, and I would join the judge in his expression of indebtedness to the author. Referring to *Phillips* v. *Brooks Ltd.*[5] Dr. Goodhart asked "Did the shopkeeper believe that he was "entering into a contract with Sir George Bullough and did North "know this? If both answers are in the affirmative, then it is "submitted that there was no contract."

I think there may be a doubt in that case whether both the answers should have been in the affirmative, but on the facts of the present case I feel no doubt and I would uphold the judge's view of no contract.

Dr. Goodhart might well be right when he said that "There "is no branch of the law of contract which is more uncertain "and difficult" than that involved in the present case, and I am conscious that our decision here will not have served to dispel the uncertainty.

The recent case in the New Zealand courts, *Fawcett* v. *Star Car Sales Ltd.*,[6] has also produced a division of opinion, Gresson P. taking a different view from North J. and Cleary J. in the appellate court, who upheld the judgment of Hardie Boys J.[7] that a mistake by a purchaser as to the identity of a person with whom he is dealing does not necessarily invalidate any sale which takes place. North J. put the question thus[8]: "Does the purchaser of a chattel who pays the price asked by the true owner "and takes delivery of the chattel from the true owner acquire a "good title if it so happens that he is told and believes he is "dealing with the previous owner who he wrongly thinks is still "the true owner?" In that case, which was also the case of the purchase of a motor-car, the purchase of the car had not been completed by the purchaser and judgment had been obtained against him. In the action, he was seeking to establish that no contract of sale of the car had been made by the purchaser. North J. said[9]: "In my view, the vital and indeed all-important "matter was the representation made by Mrs. Davies that she "was the true owner of the motor-car. The name 'Mrs. Fawcett' "meant nothing at all to the purchaser. All he was "interested in was to ensure that he was dealing with the true "owner, and indeed he was. His eyes as well as his mind "rested on Mrs. Davies. In my opinion then the representation "that the person present negotiating the sale was 'Mrs.

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[5] [1919] 2 K.B. 243.

[6] [1960] N.Z.L.R. 406, C.A.

[7] [1959] N.Z.L.R. 952.

[8] [1960] N.Z.L.R. 406, 425.

[9] Ibid. 426.

"'Fawcett' amounted to no more than a false description." Cleary J. said[10]: "Mr. Gould believed that the woman before "him was Mrs. Fawcett (which she was not) and was the owner "of the car (which for the present purposes she was) and he was "in fact dealing with a person able to make title to the car. In "my view, there was not merely one side to a contract but a "contract in fact, voidable it is true, but one under which the "property passed from the owner to the purchaser notwith-"standing the false name assumed by the owner." The majority of the court therefore accepted the view that a contract was entered into. That case reveals the difficulties of the problem. It turns, I think, on the view taken of the facts and, apart from a comprehensive review of the authorities made by Gresson P., I do not think it is helpful in the present case.

The question in each case should be solved, in my opinion, by applying the test, which Slade J. applied, "How ought the "promisee to have interpreted the promise" in order to find whether a contract has been entered into.

I am in agreement with the judge when he quotes, accepts and applies the following passage from Dr. Goodhart's article—"It is the interpretation of the promise which is the essential "thing. This is usually based on the interpretation which a "reasonable man, in the promisee's position, would place on it, "but in those cases where the promisor knows that the promisee "has placed a peculiar interpretation on his words, then this is "the binding one. The English law is not concerned with the "motives of the parties nor with the reasons which influenced "their actions. For practical reasons it has limited itself to the "simple questions: what did the promisor promise, and how "should this be interpreted?"

Phillips v. *Brooks Ltd.*[11] is the closest authority on which the defendant relies. Once that is distinguished on its facts, without going so far as to say it is wrong, authority leans strongly in favour of the judgment appealed from.

Cundy v. *Lindsay*,[12] on the findings of the Court of Appeal[13] and the House of Lords, was to the same effect as the present case. The plaintiffs intended to sell to Blenkiron & Co. but Blenkarn fraudulently assumed the position of the buyer. Therefore, an offer to sell to Blenkiron & Co. was knowingly "accepted" by Blenkarn and there was no contract.

[10] [1960] N.Z.L.R. 406, 431.

[11] [1919] 2 K.B. 243.

[12] (1878) 3 App.Cas. 459, H.L.

[13] Sub nom. *Lindsay* v. *Cundy* (1877) 2 Q.B.D. 76, C.A.

But as the learned authors of Cheshire and Fifoot on the Law of Contract, 5th ed. (1960), p. 197, point out, another view of the facts of that case might have been that "the plaintiffs, "though deceived by the fraud of Blenkarn, intended or were at "least content to sell to the person who traded at 37 Wood "Street, from which address the offer to buy had come and to "which the goods were sent. If this were the true position, "there was a contract with Blenkarn of 37 Wood Street, though "one that was voidable against him for his fraud."

Blenkiron & Co.'s address was 123 Wood Street and the three judges of the Queen's Bench Division[14] had taken this view.

Hardman v. *Booth*[15] more closely supports the judgment in the present case. One of the plaintiffs was fraudulently persuaded by Edward Gandell that he was a member of Gandell & Co., which in fact consisted only of Thomas Gandell. It was held that there was no contract since the plaintiff's offer was made to Thomas only, as Edward knew to be the fact, and, therefore, he could not accept it himself.

The legal position is, I think, well illustrated by Dr. Goodhart in the article (57 L.Q.R. 228, 241) already referred to. There is a difference between the case where A makes an offer to B in the belief that B is not B but is someone else, and the case where A makes an offer to B in the belief that B is X. In the first case B does in fact receive an offer, even though the offeror does not know that it is to B he is making it, since he believes B to be someone else. In the second case, A does not in truth make any offer to B at all; he thinks B is X, for whom alone the offer is meant. There was an offer intended for and available only to X. B cannot accept it if he knew or ought to have known that it was not addressed to him.

The judgment has quoted and referred to Pothier's statement of the law (Traité des Obligations (1803), s. 19, p. 13), and I have observed that Dr. Goodhart concludes his article by saying that "it is certainly time that Pothier's statement was firmly and "finally buried."

Slade J. would have held equally for the plaintiffs if he had applied the subjective test, which Pothier seems to stipulate. Pothier's statement has been cited in several English cases—by Fry J. in *Smith* v. *Wheatcroft*,[16] a case of specific performance, and in this court in *Gordon* v. *Street*,[17] and followed in *Sowler* v. *Potter*.[18]

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[14] Sub nom. *Lindsay* v. *Cundy* (1876) 1 Q.B.D. 348.

[15] (1863) 1 H. & C. 803; 158 E.R. 1107.

[16] (1878) 9 Ch.D. 223, 230.

Having regard to the judge's finding that whichever view he takes it does not affect his decision, I do not feel the occasion appropriate to consider further the part that Pothier's views should play in English law.

If it is the formation of a contract which calls for consideration, as it is here, " How ought the promisee to have interpreted " the promise " is, in my opinion, the correct approach, as the judge has held; but I recognise that the correct answer may not always prove as ascertainable as I believe it to be in the present case.

I would dismiss the appeal.

PEARCE L.J. I agree. The question here is whether there was any contract, whether offer and acceptance met. For, as Gresson P. said in *Fawcett* v. *Star Car Sales Ltd.*,[19] " a void " contract is a paradox; in truth there is no contract at all."

Much argument has ranged round Professor Goodhart's illuminating article of which the judge made considerable use in arriving at his conclusion. The author rightly points out that the often-quoted passage from Pothier is misleading. For, it seems to substitute for the objective English test, " How ought " the promisee to have interpreted the promise," the entirely different subjective test, " What did the promisor intend when " he made the promise," and if taken literally it seems to involve " an inquisition into the feelings," and into the motives of the promisor. When an offeror seeks to avoid an apparent contract on the ground of mistaken identity the investigation must start with his actual state of mind. For it would be absurd if he could avoid the contract when he was not really mistaken in his own mind as to the offeree's identity or when the apparent contract was not induced by mistake, when he was equally prepared to make the contract had he not been mistaken. That, as it seems to me, is a preliminary essential. But the courts, in deciding the question whether the apparent contract is non-existent owing to mistake in identity, apply the usual objective test (see Holmes on the Common Law (1881), p. 308, Lecture 9), rather than a subjective test which would gravely impair the certainty and stability of contracts. The judge approached the matter on an

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[17] [1899] 2 Q.B. 641, 647; 15 T.L.R. 445, C.A.

[18] [1940] 1 K.B. 271; 56 T.L.R. 142; [1939] 4 All E.R. 478.

[19] [1960] N.Z.L.R. 406, 412.

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objective basis. He pointed out, however, that he would have reached the same result by approaching the matter on the subjective test suggested by Pothier. In cases such as this the cheat is fully aware of the offeror's actual state of mind. Moreover, he could not be heard to say that he was not aware of the offeror's state of mind when he has himself deliberately and fraudulently induced it. Thus the objective and subjective tests produce the same result in such a case, and it is the offeror's intention which provides the answer. It is for that reason, I think, that in such cases as this so many observations have been made that are equally referable to the subjective and objective test.

The real problem in the present case is whether the plaintiffs were in fact intending to deal with the person physically present, who had fraudulently endowed himself with the attributes of some other identity, or whether they were intending only to deal with that other identity. If the former, there was a valid but voidable contract and the property passed. If the latter, there was no contract and the property did not pass. The cases on this difficult subject have been very fully set out in an interesting dissenting judgment of Gresson P. in *Fawcett* v. *Star Car Sales Ltd.*,[20] but the facts in that case, though they concern the fraudulent sale of a motor-car, are dissimilar in certain ways that make the decision itself inapplicable to the present case.

The judge dealt with the matter as if the plaintiffs were the offerors and the cheat was the acceptor, and for convenience I do likewise. The question which was offeror and which was offeree makes no difference to the principle. There are, no doubt, cases where the answer to that question might throw some light on the facts, but in this case no help is derived from it. Here it may well be that the ultimate offeror was the false Hutchinson and the plaintiffs were the "acceptors," in which case the problem is whether the plaintiffs were intending to deal with or accept an offer from the false Hutchinson physically present or the real Hutchinson of Stanstead House.

The mere fact that the offeror is dealing with a person bearing an alias or false attributes does not create a mistake which will prevent the formation of a contract: *King's Norton Metal Co. Ltd.* v. *Edridge, Merrett & Co. Ltd.*[21] For in such a case there is no other identity for which the identity of the offeree is mistaken. "There was only one entity, trading it might be under

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[20] [1960] N.Z.L.R. 406, 408.

[21] 14 T.L.R. 98.

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"an alias, and there was a contract by which the property passed "to him": see *per* A. L. Smith L.J.[22]

But where a cheat passes himself off as another identity (e.g., as someone with whom the other party is accustomed to deal), it is otherwise. In *Cundy* v. *Lindsay* Lord Cairns L.C. said[23]: "I ask the question, how is it possible to imagine that in that "state of things any contract could have arisen between the "respondents and Blenkarn, the dishonest man? Of him they "knew nothing, and of him they never thought. With him they "never intended to deal. Their minds never even for an instant "of time rested upon him, and as between him and them there "was no consensus of mind which could lead to any agreement "or any contract whatever. As between him and them there "was merely the one side to a contract, where, in order to "produce a contract, two sides would be required."

An apparent contract made orally inter praesentes raises particular difficulties. The offer is apparently addressed to the physical person present. Prima facie, he, by whatever name he is called, is the person to whom the offer is made. His physical presence identified by sight and hearing preponderates over vagaries of nomenclature. "Praesentia corporis tollit errorem "nominis" said Lord Bacon (Law Tracts (1737), p. 102). Yet clearly, though difficult, it is not impossible to rebut the prima facie presumption that the offer can be accepted by the person to whom it is physically addressed. To take two extreme instances. If a man orally commissions a portrait from some unknown artist who had deliberately passed himself off, whether by disguise or merely by verbal cosmetics, as a famous painter, the impostor could not accept the offer. For though the offer is made to him physically, it is obviously, as he knows, addressed to the famous painter. The mistake in identity on such facts is clear and the nature of the contract makes it obvious that identity was of vital importance to the offeror. At the other end of the scale, if a shopkeeper sells goods in a normal cash transaction to a man who misrepresents himself as being some well-known figure, the transaction will normally be valid. For the shopkeeper was ready to sell goods for cash to the world at large and the particular identity of the purchaser in such a contract was not of sufficient importance to override the physical presence identified by sight and hearing. Thus the nature of the proposed contract must have a strong bearing on the question of whether the intention of the offeror (as understood by his offeree) was to make his offer to some other particular identity rather than to the physical person to whom it was orally offered.

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[22] 14 T.L.R. 98, 99.

[23] 3 App.Cas. 459, 465.

In our case, the facts lie in the debatable area between the two extremes. At the beginning of the negotiations, always an important consideration, the name or personality of the false Hutchinson were of no importance and there was no other identity competing with his physical presence. The plaintiffs were content to sell the car for cash to any purchaser. The contractual conversation was orally addressed to the physical identity of the false Hutchinson. The identity was the man present, and his name was merely one of his attributes. Had matters continued thus, there would clearly have been a valid but voidable contract.

I accept the judge's view that there was no contract at the stage when the man pulled out his cheque book. From a practical point of view negotiations reached an impasse at that stage. For the vendor refused to discuss the question of selling on credit. It is argued that there was a contract as soon as the price was agreed at £717 and that from that moment either party could have sued on the contract with implied terms as to payment and delivery. That may be theoretically arguable, but, in my view, the judge's more realistic approach was right. Payment and delivery still needed to be discussed and the parties would be expecting to discuss them. Immediately they did discuss them it became plain that they were not ad idem and that no contract had yet been created. But, even if there had been a concluded agreement before discussion of a cheque, it was rescinded. The man tried to make Miss Ingram take a cheque. She declined and said that the deal was off. He did not demur but set himself to reconstruct the negotiations. For the moment had come, which he must all along have anticipated, as the crux of the negotiations, the vital crisis of the swindle. He wanted to take away the car on credit against his worthless cheque, but she refused. Thereafter, the negotiations were of a different kind from what the vendor had mistakenly believed them to be hitherto. The parties were no longer concerned with a cash sale of goods where the identity of the purchaser was prima facie unimportant. They were concerned with a credit sale in which both parties knew that the identity of the purchaser was of the utmost importance. She now realised that she was being asked to give to him possession of the car on the faith of his cheque.

This was an important stage of the transaction because it demonstrated quite clearly that she was not prepared to sell on credit to the mere physical man in her drawing room though he represented himself as a man of substance. He proceeded to "give to airy nothing a local habitation and a name." He tried to persuade her to sell to him as P. G. M. Hutchinson of Stanstead House, a personality which no doubt he had selected for the purpose of inspiring confidence into his victim. This was unsuccessful. Only when she had ascertained (through her sister's short excursion to the local post office and investigation of the telephone directory) that there was a P. G. M. Hutchinson of Stanstead House in the directory did she agree to sell on credit. The fact that the man wrote the name and address on the back of the cheque is an additional indication of the importance attached by the parties to the individuality of P. G. M. Hutchinson of Stanstead House.

It is not easy to decide whether the vendor was selling to the man in her drawing room (fraudulently misrepresented as being a man of substance with the attributes of the real Hutchinson) or to P. G. M. Hutchinson of Stanstead House (fraudulently misrepresented as being the man in her drawing room). Did the individuality of P. G. M. Hutchinson of Stanstead House or the physical presence of the man in the room preponderate? Can it be said that the prima facie predominance of the physical presence of the false Hutchinson identified by sight and hearing was overborne by the identity of the real Hutchinson on the particular facts of the present case?

The judge said: "I have not the slightest hesitation in reaching the conclusion that the offer which the plaintiffs made to accept the cheque for £717 was one made solely to, and one which was capable of being accepted only by, the honest Hutchinson—that is to say Philip Gerald Morpeth Hutchinson of Stanstead House, Stanstead Road, Caterham, Surrey, and that it was capable of being accepted only by the honest Hutchinson." In view of the experience of the judge and the care which he devoted to the present case, I should hesitate long before interfering with that finding of fact, and I would only do so if compelled by the evidence or by the view that the judge drew some erroneous inference. Where, as here, a borderline case is concerned with ascertaining the intention of the parties, the views of the trial judge who hears the witnesses should not lightly be discarded. I am not persuaded that on the evidence he should have found otherwise.

It is argued that the judge should have come to a contrary

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conclusion by following *Phillips* v. *Brooks Ltd.*[24] I do not find that case easy to evaluate, because the facts are far from clear. It appears from the report that the name of Sir George Bullough was not mentioned until after the deal had apparently been concluded and the cheque in payment of the goods had been or was being written out. Then, apparently, as a postscript or variation of the transaction, the false Sir George obtained leave to take off one of the articles without waiting for the cheque to be cleared, and the vendor thereby relinquished his lien on that article. The plaintiff in re-examination had said that he had no intention of making any contract with any other person than Sir George, but those words could hardly be true literally, since he had apparently made a contract with the man before he was told that he was Sir George.

Viscount Haldane in *Lake* v. *Simmons*[25] said of that case: "Horridge J. found, as a fact, that though the jeweller believed "the person to whom he handed the jewel was the person he "pretended to be, yet he intended to sell to the person, whoever "he was, who came into the shop and paid the price, and that "the misrepresentation was only as to payment." In my view, it was a border-line case decided on its own particular facts, and is in no wise decisive of the case before us.

Hardman v. *Booth*[26] was decided the other way. There the plaintiffs, going to the place of business of Gandell & Co., which consisted only of Thomas Gandell, were fraudulently misled at interviews with his son Edward, an unauthorised clerk in the business, into invoicing goods to Edward Gandell & Co. and paying with a bill of exchange similarly made out. It was held that there was no contract. Pollock C.B. said[27]: "It is difficult "to lay down any general rule by which, at all times and under "any circumstances, it may be determined whether or no there "is a contract voidable at the option of the party defrauded, "but in this case I think it clear that there was no contract. "Mr. Hawkins contended that there was a contract personally "with Edward Gandell, the individual with whom the conversa-"tions took place . . . but the plaintiffs supposed they were dealing "with Gandell & Co., the packers, to whom they sent the goods; "the fact being that Edward Gandell was not a member of that "firm and had no authority to act as their agent. Therefore at "no period of time were there two consenting minds to the same

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[24] [1919] 2 K.B. 243.

[25] [1927] A.C. 487, 501.

[26] 1 H. & C. 803.

[27] Ibid. 806.

"agreement." Wilde B. said[28]: "It is clear that there was "no sale to Gandell & Co., because they never authorised Edward "Gandell to purchase for them; and it is equally clear that there "was no sale to Edward Gandell, because the plaintiffs never "intended to deal with him personally." That case, however, was a clearer case of there being no contract than is the present one, since there the plaintiffs had gone to the premises of Gandell & Co. to deal with that firm, and on those premises they had dealt with someone who duped them into believing that he was a member of the firm. Had the plaintiffs in the present case gone to Stanstead House especially to deal with the real Hutchinson and been duped on the premises by the false Hutchinson, their case would have been very clear.

In *Lake* v. *Simmons*[29] the court was dealing with a somewhat different problem, namely, whether a jeweller had "entrusted" possession of jewellery to a cheat, and it held that he had not. Viscount Haldane there said[30]: "In circumstances such as these, "I think there was no such consensus ad idem as, for example, "Lord Cairns in his judgment in *Cundy* v. *Lindsay*[31] declared "to be requisite for the constitution of a contract. No doubt "physically the woman entered the shop and pretended to bar-"gain in a particular capacity, but only on the footing of being "a different person from what she really was. There was never "any contract which could afterwards become voidable by reason "of a false representation made in obtaining it, because there "was no contract at all, nothing excepting the result of a trick "practised on the jeweller."

Each case must be decided on its own facts. The question in such cases is this. Has it been sufficiently shown in the particular circumstances that, contrary to the prima facie presumption, a party was not contracting with the physical person to whom he uttered the offer, but with another individual whom (as the other party ought to have understood) he believed to be the physical person present. The answer to that question is a finding of fact.

It is argued that although such a finding might properly have been reached if the cheat had pretended to be some great man or someone known already to the vendor by dealing or by reputation, it could not be so in this case, since the vendor had no knowledge of P. G. M. Hutchinson of Stanstead House. Had it not been for investigation of the telephone directory, that might well be so; but here the entry represented an individual of apparent standing and stability, a person whom the vendor was ready to trust with her car against his cheque. His individuality was less dominating than that of a famous man would be, but that is a question of degree. It does not, I think, preclude the judge from finding that it was with him that the vendor was intending to deal.

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[28] 1 H. & C. 803, 808.

[29] [1927] A.C. 487.

[30] Ibid. 500.

[31] 3 App.Cas. 459.

The court is naturally reluctant to accept the argument that there has been a mistake in such a case as this since it creates hardship on subsequent bona fide purchasers. The plaintiffs' unguarded transaction has caused loss to another. And, unfortunately, when the contract is void at common law, the court cannot (as the law stands now) by its equitable powers impose terms that would produce a fairer result. However, in the present case the subsequent purchasers, although the judge found that there was no mala fides, were no more wise or careful than the plaintiffs. The regrettable ease with which a dishonest person can accomplish such a fraud is partially due to the unfortunate fact that registration books are not documents of title and that registration and legal ownership are so loosely connected.

Although I appreciate the force of Mr. Chapman's very full and fair argument, he has failed to persuade me that the judge could not properly arrive at his conclusion. I agree that the appeal should be dismissed.

Devlin L.J. The point on which the present case turns is the effect of deception about the identity of a contracting party. It is a difficult point on which I have the misfortune to differ from my brethren. On all other points I agree with them and shall add nothing. On the chief point I shall not attempt to analyse all the authorities; there is a very full discussion of them in the recent judgment of Gresson P. in *Fawcett* v. *Star Car Sales Ltd.*,[32] and I shall not need to repeat more than the essential facts.

The plaintiffs advertised their car for sale at £725 or nearest offer. The swindler, whose true name is unknown and whom Mr. Chapman has conveniently described as H., called in answer to the advertisement and, after inspection and negotiation, offered £717; and as soon as the figure was agreed, produced his cheque book. Miss Elsie Ingram, who was making the deal on behalf of the plaintiffs, at once said that she would not in any circumstances accept a cheque, and she sought to bring the interview to an end. He went on talking. He had previously given his name as Hutchinson and said that he lived at Caterham; and it is common ground that if he had been able and willing to pay cash the plaintiffs would have required to know no more. H. now said that he was a P. G. M. Hutchinson, that he had business interests in Guildford and that he lived at Stanstead House, Stanstead Road, Caterham. On hearing the name and address, Miss Hilda Ingram, who was in the room, slipped out and went round to the post office near by, looked in the directory covering the district of Caterham and saw the entry, "Hutchinson, "P. G. M., Stanstead House, Stanstead Road, Caterham 4665." She was away five minutes or a little longer; and during that time the conversation between H. and Miss Elsie Ingram had continued. He had tried to convince Miss Ingram that he was indeed the Hutchinson he had mentioned. When Miss Hilda came back she told Miss Elsie that she had checked with the telephone directory and that there was such a person listed. They then decided that they would take his cheque and the deal was so concluded. The cheque was in due course dishonoured. Meanwhile, H. sold the car to the defendant.

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[32] [1960] N.Z.L.R. 406.

The question is whether H. was able to pass the property in the car to the defendants so that they can resist a claim based on conversion; and that turns on whether the contract between the plaintiffs and H. was voidable or void. If the plaintiffs were induced to enter into a contract by H.'s false representation as to his identity, the contract remains valid until the plaintiffs elect to disaffirm it; since before they did that, H. had parted with the car to the defendants, he was in a position to give them a good title to it. If, however, mistake as to identity prevented the contract being made at all, the property in the car did not pass to H., and so he could give no title to the defendants.

In the textbooks, cases of mistaken identity are to be found both in the chapters that deal with the formation of contract and in those that deal with the effect of mistake. Whichever way it is looked at, the essential question is the same: has a contract been made? If the fatal defect goes to form, the question is answered with a simple negative and the case is put under the head of formation. If the defect is one of substance, that is, where the outward form is complete but the necessary consensus is vitiated by mistake, the question is answered by saying that the contract is void. It may be objected that a void contract is a meaningless expression; but it is a useful one to describe a contract that is perfect in form but void of substance. There is also this practical difference. It is for the plaintiff to prove offer and acceptance in form. But mistake is a ground of defence and it is for the defendant to plead it and assert that the contract is not what it seems to be. If the contract is complete on the surface, as when it is a formal document, the burden will be on him from the outset. But in oral contracts it may well be in question whether there is a contract even in appearance.

So the first thing for a judge to do is to satisfy himself that the alleged contract has been properly formed, and Dr. Goodhart, in the article that the judge has adopted, has shown how easy it is to fall into error if one does not begin with that. There must be offer and acceptance. The offer must be addressed to the offeree, either as an individual or as a member of a class or of the public. The acceptance must come from one who is so addressed and must itself be addressed to the offeror. *Boulton* v. *Jones*,[33] for example, is a simple case in which an offer was accepted by someone to whom it was not addressed. The classic case of *Cundy* v. *Lindsay*[34] was one in which the acceptance was not addressed to the offeror. The offer, as in the instant case, was addressed to a person who held himself out as willing to do business. But the offer was made by Blenkarn and the acceptance addressed to Blenkiron. The fact that there was a real Blenkiron, whom Blenkarn was pretending to be, showed that it was not a case of falsa demonstratio non nocet. It is noteworthy that the word "mistake" is not mentioned in the judgments of either of these cases.

Before, therefore, I consider mistake, I shall inquire whether there is offer and acceptance in form. There is no doubt that H.'s offer was addressed to Miss Ingram and her acceptance, apparently, addressed to him. But, it is argued, the acceptance was in reality addressed to P. G. M. Hutchinson, who was not the offeror, and, therefore, no contract was made. There can be no doubt upon the authorities that this argument must be settled by inquiring with whom Miss Ingram intended to contract: was it with the person to whom she was speaking or was it with the person whom he represented himself to be? It has been pressed upon us that this is a question of fact and that we ought to give great weight to the answer to it provided by the trial judge. It

[33] (1857) 2 H. & N. 564.

[34] 3 App.Cas. 459.

is, I think, a mixed question of fact and law. I am sure that any attempt to solve it as a pure question of fact would fail. If Miss Ingram had been asked whether she intended to contract with the man in the room or with P. G. M. Hutchinson, the question could have no meaning for her, since she believed them both to be one and the same. The reasonable man of the law—if he stood in Miss Ingram's shoes—could not give any better answer. Whether it is fact or law, it is not a question that the trial judge is any better equipped to answer than we are. In saying that, I must acknowledge that I am with diffidence refusing the guidance offered by Viscount Sumner in *Lake* v. *Simmons*[35]: "The conclusion that his state of mind was an "appearance of consent produced by the trick and not a real "consent induced by fraud is a judicial conclusion from the circumstances proved, from the evidence of the victim as to what "was said and done, what he believed, and what he would or "would not have done in the absence of that belief, and finally, "from the judge's own view of the ability of the witness himself "to analyse and explain his own mental processes with tolerable exactness. A conclusion from these materials is greatly "assisted by seeing him and judging what manner of man he is." I hope that I am not diminishing the province of the trial judge, which I should always wish to honour and respect. But I cannot understand how observation of the witness can detect whether his consent was produced by a trick or induced by fraud; I doubt whether an analysis of his mental processes would help either. All that Miss Ingram or any other witness in her position can say is that she did in fact accept the offer made to her; and that, if she had not been tricked or deceived, she would not have accepted it.

Courts of law are not inexperienced in dealing with this sort of situation. They do so by means of presumptions. Let me take as an example the law that governs a contract. This depends on the intentions of the parties, but no one ever attempts to ascertain their intentions by question and answer. The answer would almost invariably be that neither of the parties had thought about the matter at all. If one of them were pressed to say what law he would have chosen if he had thought about it, he would naturally tend to opt for the law that would be most favourable to him in the circumstances of the dispute that had brought him to court. In the present type of case, the answer to a similar

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[35] [1927] A.C. 487, 503.

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type of question might be equally misleading; as the deceived party in the present case, the plaintiff wants the contract declared void ab initio; as the deceived party in the recent case of *Fawcett* v. *Star Car Sales Ltd.*,[36] the defendant there wanted it affirmed. The court, therefore, has to work on the presumed intention of the parties. In the case of conflict of laws, there are a number of presumptions which the court uses, such as that the parties are presumed to intend the law of the country where they have provided for arbitration, if such be the case, or the law of the place where the contract was made. Whether the court, when it acts in this way, is really ascertaining the intentions of the parties or whether it is simply providing a just solution of their difficulties is a theoretical question which I need not explore. Lord Wright has some penetrating observations to make about the problem as it arises in cases of frustration: see *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd.*[37] and *Denny Mott & Dickson Ltd.* v. *Fraser & Co. Ltd.*[38]

In my judgment, the court cannot arrive at a satisfactory solution in the present case except by formulating a presumption and taking it at least as a starting point. The presumption that a person is intending to contract with the person to whom he is actually addressing the words of contract seems to me to be a simple and sensible one and supported by some good authority. It is adopted in Benjamin on Sale, 8th ed. (1950), p. 102, where two decisions in the United States are referred to, *Edmunds* v. *Merchants Despatch Co.*[39] and *Phelps* v. *McQuade.*[40] The reasoning in the former case was adopted by Horridge J. in *Phillips* v. *Brooks Ltd.*,[41] and the latter case is a decision of the New York Court of Appeals. All these three cases still stand as the law in their respective jurisdictions. Corbin on Contract (1951), vol. 3, s. 602, p. 385, cites them and a number of others, and states the general principle in the United States as follows: "The "courts hold that if A appeared in person before B, impersonating "C, an innocent purchaser from A gets the property in the goods "against B."

I do not think that it can be said that the presumption is conclusive, since there is at least one class of case in which it can be rebutted. If the person addressed is posing only as an agent, it is plain that the party deceived has no thought of contracting with him but only with his supposed principal; if then there is no actual or ostensible authority, there can be no contract. *Hardman* v. *Booth*[42] is, I think, an example of this. Are there any other circumstances in which the presumption can be rebutted? It is not necessary to strain to find them, for we are here dealing only with offer and acceptance; contracts in which identity really matters may still be avoided on the ground of mistake. I am content to leave the question open, and do not propose to speculate on what other exceptions there may be to the general rule. What seems plain to me is that the presumption cannot in the present case be rebutted by piling up the evidence to show that Miss Ingram would never have contracted with H. unless she had thought him to be P. G. M. Hutchinson. That fact is conceded and, whether it is proved simpliciter or proved to the hilt, it does not go any further than to show that she was the victim of fraud. With great respect to the judge, the question that he propounded as the test is not calculated to show any more than that. He said: "Is it to be seriously suggested that they "were willing to accept the cheque of the rogue other than in "the belief, created by the rogue himself, that he, the rogue, was "in fact the honest P. G. M. Hutchinson of the address in "Caterham with the telephone number which they had verified?" In my judgment, there is everything to show that Miss Ingram would never have accepted H.'s offer if she had known the truth, but nothing to rebut the ordinary presumption that she was addressing her acceptance, in law as well as in fact, to the person to whom she was speaking. I think, therefore, that there was offer and acceptance in form.

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[36] [1960] N.Z.L.R. 406.

[37] [1943] A.C. 32, 70; 58 T.L.R. 308; [1942] 2 All E.R. 122, H.L.

[38] [1944] A.C. 265, 275; 60 T.L.R. 419; [1944] 1 All E.R. 678, H.L.

[39] (1883) 135 Mass. 283.

[40] (1917) 220 N.Y. 232.

[41] [1919] 2 K.B. 243.

On my view of the law, it, therefore, becomes necessary to consider next whether there has been a mistake that vitiates the contract. As both my brethren are of opinion that there has been no offer and acceptance, the result of this further inquiry cannot affect the decision in the present case or its ratio, and I shall, therefore, state my conclusions and my reasons for it as briefly as may be.

In my judgment, there has been no such mistake. I shall assume without argument what I take to be the widest view of mistake that is to be found in the authorities; and that is that a mistake avoids the contract if at the time it is made there exists some state of fact which, as assumed, is the basis of the contract and as it is in truth, frustrates its object. Cases of mistaken identity have usually been dealt with in the authorities by the application of the test propounded by Pothier, Traité des Obligations (1803), s. 19, p. 13, where he said: "Wherever the "consideration of the person with whom I contract is an ingre-"dient of the contract which I intend to make, an error "respecting the person destroys my consent, and consequently "annuls the agreement." If this is wider than the principle I have stated, I do not think it can be part of the law of England, for I can see no reason why mistake as to identity should operate more easily to avoid a contract than any other sort of mistake. If Pothier is correctly interpreted, the word "ingredient" is very wide; but the examples which he gives to illustrate his proposition are examples in which mistaken identity would generally destroy a fundamental assumption and frustrate the object of the contract. The whole object of contracting for a portrait, for instance, is to have it done by the particular artist selected and so his identity is normally essential.

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[42] 1 H. & C. 803.

The fact that Miss Ingram refused to contract with H. until his supposed name and address had been "verified" goes to show that she regarded his identity as fundamental. In this she was misguided. She should have concerned herself with credit-worthiness rather than with identity. The fact that H. gave P. G. M. Hutchinson's address in the directory was no proof that he was P. G. M. Hutchinson; and if he had been, that fact alone was no proof that his cheque would be met. Identity, therefore, did not really matter. Nevertheless, it may truly be said that to Miss Ingram, as she looked at it, it did. In my judgment, Miss Ingram's state of mind is immaterial to this question. When the law avoids a contract ab initio, it does so irrespective of the intentions or opinions or wishes of the parties themselves. That is the rule in the case of frustration: see *Hirji Mulji* v. *Cheong Yue S.S. Co. Ltd.*[43] It is the rule also in a case such as *Scammell (G.) & Nephew Ltd.* v. *Ouston*,[44] where the parties believed themselves to have contracted, but had failed to reach agreement on essentials with sufficient particularity. This rule applies in the case of mistake because the reason for the avoidance is the same, namely, that the consent is vitiated by non-agreement about essentials. It is for the court to determine what in the light of all the circumstances is to be deemed essential. In my judgment, in the present case H.'s identity was immaterial. His creditworthiness was not, but creditworthiness in relation to contract is not a basic fact; it is only a way of expressing the belief that each party normally holds that the other will honour his promise.

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[43] [1926] A.C. 497; 42 T.L.R. 359, P.C.

[44] [1941] A.C. 251; 57 T.L.R. 280; [1941] 1 All E.R. 14, H.L.

I wish that I could conclude this judgment without any reference to *Lake* v. *Simmons*,[45] for that is a case with which I find it very difficult to deal briefly. But if, as is often suggested, the ratio decidendi in the House of Lords is that enunciated by Viscount Haldane[46] in the leading speech, I should find it impossible to distinguish the present case satisfactorily. I must, therefore, embark on the difficult task of ascertaining what the true ratio is.

I do not think that the reasoning in the case can properly be analysed without some introductory observations about larceny by a trick. I base them on the judgment of Sellers J., as he then was, in *Du Jardin* v. *Beadman Bros. Ltd.*[47] The history of the offence is fully set out in Russell on Crime, 11th ed. (1958). p. 1036, and I give below only the bare account of it that is necessary for my purpose. Larceny at common law required that there should be an asportavit or taking of the goods with intent to steal. This produced a difficulty in the case of a bailee who obtained possession of the goods lawfully; he could not thereafter be guilty of larceny by appropriating them, however dishonestly. This difficulty was finally removed by statute in 1857 when the offence of larceny by a bailee was created. "In the meantime," as Russell says at p. 1041, "the judges had found themselves "forced to adopt strange contortions of reasoning in order to "justify the conviction of dishonest men." The difficulty, which had to be removed, was that the bailee had taken the chattel with the consent of the owner. In *R.* v. *Pear*,[48] the court decided, that if a horse was hired with the intention of stealing it, the fraudulent intention of the bailee at the inception of the transaction in some way negatived in law the consent of the owner to do what he in fact did. Therefore, there was a taking without consent, which came to be called larceny by a trick. But the courts restricted this doctrine to the transfer of possession; and they always refused to apply it to a case where what was in issue was the transfer of property. It is, perhaps, for this reason that we have not been troubled here by any argument about larceny by a trick. But there has been a great difference of opinion whether this notion of consent should or should not be imported into other branches of the law, particularly liability under the Factors Act, 1889. Until recently, the ruling judgments on this point have been obiter; but I trust that the law may now be regarded as settled by the decision of Sellers J. in *Du Jardin* v. *Beadman*,[49] where he held that "consent" in the Factors Act, 1889, was not to be interpreted in an artificial way in order to bring it into harmony with the criminal law. I need not pursue the controversy further. Its only importance for my purpose is so that the speech of Viscount Sumner, which I think to be crucial in *Lake* v. *Simmons*,[50] is properly understood.

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[45] [1927] A.C. 487.

[46] Ibid. 494.

[47] [1952] 2 Q.B. 712; [1952] 1 T.L.R. 1601; [1952] 2 All E.R. 160.

[48] (1779) 2 East P.C. 685.

The facts in *Lake* v. *Simmons* centred round a woman who was living with a Van der Borgh, and who had dealings with the plaintiff, a jeweller. She falsely represented to him that she was Mrs. Van der Borgh and she obtained jewellery from him by falsely representing that she desired to show it to her husband for his approval, and also to a person she named as Commander Digby, who did not in fact exist. She made away with the jewellery and the plaintiff sued to recover his loss under a Lloyd's policy, the defendant being an underwriter. The policy was against (inter alia) theft, but subject to an exception on which the argument turned. A convenient summary of its essential terms is given by Viscount Sumner[51]: "The exception clause "takes out of the stipulated cover against 'thefts' generally . . . "those committed by customers . . . but only when, the words "'in respect of goods entrusted to them by the assured' are "satisfied."

All three courts held that there was a theft, i.e., larceny by a trick, and, accordingly, that the loss fell within the general words. There was, however, much difference of opinion about the operation of the exception. McCardie J. held[52] that the jewellery was not entrusted to the woman as a customer, but that she received it as a mere agent or messenger for the purpose of showing it to others. He, therefore, decided in favour of the plaintiff. His decision was reversed by a majority in the Court of Appeal.[53] None of the Lords Justices accepted his view that the woman was not a customer and the decision turned on the meaning of "entrusted."

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[49] [1952] 2 Q.B. 712.

[50] [1927] A.C. 487, 503.

[51] Ibid. 507.

[52] [1926] 1 K.B. 382; 42 T.L.R. 168.

[53] [1926] 2 K.B. 51; 42 T.L.R. 425, C.A.

Bankes L.J. and Warrington L.J. held that there was an entrusting within the exception so that the loss fell outside the policy. Atkin L.J. held that there was not. He said [54] that the word " entrust " implied a consensual act and that the fact of larceny negatived consent both in criminal and in civil matters. It would be absurd to hold, he thought, that the woman could both take the goods without the consent of the true owner for the purpose of larceny by a trick and be " entrusted " with the goods by the true owner.

In the House of Lords,[55] the decision of the Court of Appeal was reversed. Viscount Haldane said [56] that for the purpose of an entrusting within the meaning of the policy there must be a definite contract. He held that there was never any contract at all, because the plaintiff was entirely deceived as to the identity of the person with whom he was transacting; it was only on the footing and in the belief that she was Mrs. Van der Borgh that he was willing to deal with her at all. This is a bare summary of his reasoning; it is sufficient for my purpose to say that it is clear authority for the view from which I am dissenting. None of the rest of their Lordships expressly followed Viscount Haldane. Lord Atkinson's opinion [57] turned on the construction of the policy. He held that the entrusting within the exception could not mean the delivery in all good faith by a dealer of goods to a customer which that customer had planned to steal. He also inclined to McCardie J.'s view that the woman was not a customer. Lord Blanesburgh [58] based his conclusion on the simple ground that the woman was not a customer, but entirely agreed with the judgment of Viscount Sumner. Lord Wrenbury [59] simply concurred.

It is clear, therefore, that Viscount Haldane's reasoning can be accepted as the ratio decidendi only if it was assented to by Viscount Sumner. I know that the fault must be mine, but I find the speech of Viscount Sumner very difficult to interpret. I think that the operative part of his reasoning begins [60] after he has set out the policy. He gave a special meaning to the word " entrusted," derived from the use of the same word in an earlier part of the policy. He held that it meant entrusted on the condition of sale or return. He held that there was not an entrusting to the woman on this condition; if there was an entrusting, it was either to Van der Borgh or Commander Digby, one of whom was imaginary and the other was not a customer. That was his first reason. The second reason [61] was, I think, an acceptance of Atkin L.J.'s view of the effect of larceny by a trick. Finally, he agreed [62] that the woman was not a customer for the purpose of the exceptions clause.

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[54] [1926] 2 K.B. 51, 71, 72.

[55] [1927] A.C. 487.

[56] Ibid. 499.

[57] Ibid. 511.

[58] Ibid. 513.

[59] Ibid. 513.

[60] Ibid. 507.

But, before he gave this statement of his reasons, he made a number of observations that might suggest that he was agreeing with the view expressed by Viscount Haldane, though he never in fact said so. He said this [63]: "Again, *if* Mr. Lake consented to "nothing, analogies from the distinction between void and voidable contracts are beside the mark, and equally so are arguments which turn on *consensus ad idem* as an ingredient in the "conclusion of a contract . . . As it is, there was no contract "and nothing to avoid." I have italicised the word "if" because I think that what appears to be a positive statement that "there was no contract and nothing to avoid" is based upon the hypothesis that Lake consented to nothing. I think this must be so, for, in the next paragraph, Viscount Sumner said: "the "next step is to consider whether anything can be imputed to "Mr. Lake which would be equivalent to his consent." I think that the clue to what Viscount Sumner is saying in this part of his speech is on the next page where he said [64]: "Such facts "may raise difficulties in deciding whether his frame of mind "involved misplaced consent or was consistent with absence "of any consent at all, but the conclusion that it was such as "would negative the appearance of consent and so remove the "difficulty in the way of proving an asportavit, concludes "the whole issue." He elucidates this with three examples, one of which, a case of a confidence trick man, posing as a benevolent millionaire, would certainly not be a ground for avoiding a contract.

I think that Viscount Sumner is neither agreeing nor disagreeing with Viscount Haldane. What he is saying is that Viscount Haldane's reasoning is not to the point as he, Viscount Sumner, sees it. Distinction between void and voidable contracts are beside the mark and so are arguments which turn on consensus. The thing is concluded by the fact there is larceny by a trick. In other words, Viscount Sumner is agreeing with Atkin

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[61] [1927] A.C. 487, 508.
[62] Ibid. 511.
[63] [1927] A.C. 487, 505.
[64] Ibid. 506.

L.J.[65] and is refusing to distinguish between the sort of lack of consent that goes to make larceny by a trick and the sort that avoids a contract, though he reserved[66] his judgment about "consent" in the Factors Act, 1889. In my judgment, therefore, the ratio decidendi of *Lake* v. *Simmons* turns on the construction of the policy, and the only view for which there is a clear majority is the view that the woman was not a customer. Certainly there is no support for the opinion of Viscount Haldane in any of the other speeches and, though I recognise his great authority, I prefer to follow *Phillips* v. *Brooks Ltd.*,[67] the cases in the United States to which I have referred,[68] and the decision of the majority of the Court of Appeal in the recent case in New Zealand, *Fawcett* v. *Star Car Sales Ltd.*[69]

There can be no doubt, as all this difference of opinion shows, that the dividing line between voidness and voidability, between fundamental mistake and incidental deceit, is a very fine one. That a fine and difficult distinction has to be drawn is not necessarily any reproach to the law. But need the rights of the parties in a case like this depend on such a distinction? The great virtue of the common law is that it sets out to solve legal problems by the application to them of principles which the ordinary man is expected to recognise as sensible and just; their application in any particular case may produce what seems to him a hard result, but as principles they should be within his understanding and merit his approval. But here, contrary to its habit, the common law, instead of looking for a principle that is simple and just, rests on theoretical distinctions. Why should the question whether the defendant should or should not pay the plaintiff damages for conversion depend upon voidness or voidability, and upon inferences to be drawn from a conversation in which the defendant took no part? The true spirit of the common law is to override theoretical distinctions when they stand in the way of doing practical justice. For the doing of justice, the relevant question in this sort of case is not whether the contract was void or voidable, but which of two innocent parties shall suffer for the fraud of a third. The plain answer is that the loss should be divided between them in such proportion as is just in all the circumstances. If it be pure misfortune, the loss should be borne equally; if the fault or imprudence of either party has caused or contributed to the loss, it should be borne by

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[65] [1926] 2 K.B. 51, 71, 72.

[66] [1927] A.C. 487, 510.

[67] [1919] 2 K.B. 243.

[68] Ante, p. 66.

[69] [1960] N.Z.L.R. 406.

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that party in the whole or in the greater part. In saying this, I am suggesting nothing novel, for this sort of observation has often been made. But it is only in comparatively recent times that the idea of giving to a court power to apportion loss has found a place in our law. I have in mind particularly the Law Reform Acts of 1935, 1943 and 1945, that dealt respectively with joint tortfeasors, frustrated contracts and contributory negligence. These statutes, which I believe to have worked satisfactorily, show a modern inclination towards a decision based on a just apportionment rather than one given in black or in white according to the logic of the law. I believe it would be useful if Parliament were now to consider whether or not it is practicable by means of a similar act of law reform to provide for the victims of a fraud a better way of adjusting their mutual loss than that which has grown out of the common law.

Appeal dismissed with costs.
Leave to appeal to the House of Lords.

Solicitors: *Corbin, Greener & Cook for Charles Ingham, Clegg & Crowther, Lytham St. Annes, Lancs.; Gibson & Weldon for B. A. Greenwood & Co., Poole, Dorset.*

N. P.

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June 16, 17, 20; *July* 18.
Sellers, Pearce and Devlin L.JJ.

ATTORNEY-GENERAL *v.* HARRIS.

[1958 H. No. 3211.]

Injunction—Relator action—Attorney-General's discretion—Independent exercise of court's discretion—Repeated breaches of statute to public advantage—Prosecutions for private advantage—Question of public injury—Whether repeated breaches in themselves public detriment.

Attorney-General — Functions — Administration discretion — Relator action—Independent exercise of court's discretion—Weight to be given to Attorney-General's discretion—Circumstances justifying refusal of relief.

The defendants had sold flowers from stalls near the entrance to a cemetery in Manchester, on almost every Sunday since 1955. The stalls were about 7 feet long, and projected between 2 feet 6 inches and 3 feet 6 inches from the railings of the cemetery into a footway, between 15 and 16 feet wide, used by only a few pedestrians, except on Mothering Sunday. The defendants in trading in this manner committed offences under the Manchester Police Regulation Act, 1844,[1] and in consequence they had been prosecuted after pressure by competitors, convicted and fined small sums on many occasions; they had continued to trade to the apparent advantage of the rest of the public and themselves. The Attorney-General brought this action for an injunction restraining the defendants from committing further breaches of the Act of 1844:—

Held, (1) that persistent and deliberate flouting of the law was in itself a grave and serious injury to the public, which warranted the grant of an injunction where the monetary penalties imposed by statute were ineffective to secure compliance with the law (post, pp. 86, 89–90, 95).

Attorney-General v. *Sharp* [1931] 1 Ch. 121; 46 T.L.R. 554, C.A. applied.

Attorney-General v. *Premier Line Ltd.* [1932] 1 Ch. 303; 48 T.L.R. 104 approved.

(2) That the Attorney-General was in a different position from the ordinary litigant, for he represented the public interest and the community at large; and when he intervened to ask for relief, the courts should pay great heed to his intervention and only refuse relief in the most exceptional circumstances. There were no exceptional circumstances in the present case, and, accordingly, an injunction would be granted (post, pp. 87, 92, 95).

Dictum of Devlin J. in *Attorney-General* v. *Bastow* [1957] 1 Q.B. 514, 522; [1957] 2 W.L.R. 340; [1957] 1 All E.R. 497 approved.

Attorney-General v. *Kerr and Ball* (1914) 79 J.P. 51; 12 L.G.R. 1277 distinguished.

Decision of Salmon J. [1960] 1 Q.B. 31; [1959] 3 W.L.R. 205; [1959] 2 All E.R. 393 reversed.

APPEAL from Salmon J.

Since 1956, the defendants, Robert Harris, Audrey Harris (his wife) and Jack Ferst, had habitually erected stalls on a footway near the entrance to Southern Cemetery, Manchester, had placed there boxes, vases and buckets containing flowers, and had exposed such flowers for sale so as to obstruct or incommode the passage of the footway, contrary to section 102 of the Manchester Police Regulation Act, 1844. The first defendant, Robert Harris, had been convicted and fined in respect of breaches of the Act on 142 occasions, Audrey Harris, the second defendant, on 95 occasions, but yet they had continued to commit similar breaches.

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[1] Manchester Police Regulation Act, 1844, s. 102: "Every person "shall be liable to a penalty of not "more than 40 shillings who in any "street shall commit any of the fol- "lowing offences . . . Every person "who shall . . . place or use any ". . . stall on any footway . . . "Every person who shall . . . by "hawking or exposing for sale any ". . . article on or near any foot- "way, or by any other means shall "obstruct or incommode the free "passage of any such footway or "who shall insult, jostle, or annoy "any inhabitant or passenger."

The defendants were charged and convicted of two offences under the Act of 1844—erecting a stall on the footway, and by exposing flowers for sale on the footway obstructing the free passage thereof. The first defendant was convicted on 74 occasions for erecting a stall, and on 68 occasions for obstructing the footway. The fines imposed on the defendants varied over the years. For 11 consecutive weeks from February 16, 1958, until May 20, 1958, the first defendant was fined 40s. for erecting a stall and 10s. for obstructing the footway. After May 20, 1958, the fines dropped to 20s. and 2s. 6d. respectively. The second defendant generally was fined rather less. The fines were paid each week and the law similarly infringed the following week.

The matter was eventually referred to the Attorney-General, and the writ was issued on July 4, 1958.

The Attorney-General, suing on the relation of Manchester Corporation, contended that the penalties imposed under the Act had proved insufficient to secure compliance with it, and that the defendants intended to continue to trade in breach thereof, and claimed an injunction against each of the defendants perpetually restraining them from placing or using any stall or other article upon any footway within the City of Manchester, and from exposing for sale upon or near any such footway any flower or other article so as to obstruct or incommode the passage of such footway.

Robert and Audrey Harris, by a defence filed before solicitors were instructed to act on their behalf, alleged that they were registered street traders, licensed to trade by selling flowers in any street in the City of Manchester with certain exceptions not relevant to the present case; that street traders selling flowers at other cemeteries had never been prosecuted; that prior to 1956 flowers had been sold outside Southern Cemetery for 35 years without any prosecution being brought; that the prosecutions only began when certain adjacent shopkeepers ceased to trade from stalls outside the cemetery; and that the proceedings were in the nature of victimisation, brought at the instigation of the shopkeepers in furtherance of what was in reality a trade dispute. They further alleged that they had not obstructed the footway, but, alternatively, that if they had caused any obstruction of the footway, it was such as to cause no real inconvenience to members of the public.

The third defendant, Ferst, did not file a defence; he attended at the trial, which took place in Manchester, and gave evidence. He gave an undertaking to the court in the terms of the injunction sought by the Attorney-General. Upon that undertaking being given, the Attorney-General did not pursue his application for an injunction, nor did he seek an order for costs, as against the third defendant.

Salmon J. held that the acts of the defendants had not inconvenienced any member of the public; that they did not tend to injure the public, and that in the exercise of his discretion he would not grant an injunction. The Attorney-General appealed. Further facts are stated in the judgments.

Fenton Atkinson Q.C. and *J. M. Lever* for the Attorney-General. Salmon J. refused to grant an injunction for three reasons: First, he was uneasy about the reasons for the prosecutions of the defendants. Other rival flower sellers had influenced and exerted pressure on the members of the city council. The judge seems to have accepted that the Act of 1844 should not be used to stifle trade competition. Secondly, in his view, the defendants had not caused any damage to the public or any public nuisance, and, unless such damage or nuisance could be shown, the Attorney-General was not entitled to an injunction. Thirdly, he said that it was for the court to exercise its own discretion, which was not the same as the Attorney-General's discretion, when the latter decided to initiate a relator action for an injunction. The judge held that the Attorney-General was in the same position as any other litigant when he sought an injunction. It is submitted that the judge has misdirected himself, and that none of the reasons he gave is tenable in law.

The judge was wrong on the evidence to doubt the bona fides of the relators. All that is shown is that other flower sellers, who lived in Manchester and paid rates there, were aggrieved that the defendants, who lived outside Manchester, should be allowed to have a profitable advantage by breaking the law. It was not unnatural, therefore, that they should complain to the city council. In any event, prosecutions were started by the police independently of the city council.

The defendants have caused injury to the public by their repeated breaches of the law. The judge relied on *Attorney-General* v. *Kerr and Ball* [2] but that case is distinguishable because

[2] (1914) 79 J.P. 51; 12 L.G.R. 1277.

there the breaches were of a local by-law, not of a public statute. Further, it is not clear what cases were cited to Lush J. A public nuisance would be caused if other flower sellers traded in the same way as the defendants in the same place. In such a situation traffic would be severely obstructed.

Moreover, it is an injury to the public that the defendants defy the law and that the machinery of the law breaks down. The mere flouting of the law is in itself an injury to the public, and on the authorities once a breach of an Act of Parliament is shown to have been committed, and the Attorney-General in his discretion asks for relief to prevent further breaches, the courts should grant the Attorney-General the relief which he seeks. The Attorney-General has an absolute right to decide when to initiate proceedings. In *London County Council* v. *Attorney-General*[3] Lord Halsbury L.C. said: "It may well be true that the "Attorney-General ought not to put into operation the whole "machinery of the first law officer of the Crown in order to bring "into court some trifling matter. But if he did, it would not "go to his jurisdiction: it would go, I think, to the conduct of "his office, and it might be made, perhaps in Parliament, the "subject of adverse comment; but what right has a court of law "to interfere? If there is an excess of power claimed by a "particular public body, and it is a matter that concerns the "public, it seems to me that it is for the Attorney-General and "not for the courts to determine whether he ought to initiate "legislation in that respect or not." Although the decision in a relator action is a matter for the court (*Attorney-General* v. *Birmingham, Tame and Rea District Drainage Board*[4]) the court must accept that the Attorney-General has justifiably exercised his discretion and grant an injunction even if there is no injury to the public: see *Attorney-General* v. *Westminster City Council*[5] and *Attorney-General* v. *Great Eastern Railway Co.*[6] Where there are repeated breaches of a statute, the court ought not to inquire whether there has been any injury to the public—the Attorney-General need not adduce evidence of any such injury where a statute is violated: see *Attorney-General* v. *Cockermouth Local Board*,[7] *Attorney-General* v. *Shrewsbury (Kingsland) Bridge Co.*,[8] *Attorney-General* v. *London and North-Western Railway*

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[3] [1902] A.C. 165, 168; 18 T.L.R. 298.

[4] [1910] 1 Ch. 48; 26 T.L.R. 93, C.A.; affirmed [1912] A.C. 788, H.L.

[5] [1924] 2 Ch. 416; 40 T.L.R. 711, C.A.

[6] (1879) 11 Ch.D. 449, C.A.; affirmed (1880) 5 App.Cas. 473, H.L.

[7] (1874) L.R. 18 Eq. 172.

[8] (1882) 21 Ch.D. 752.

Co.,[9] *Attorney-General* v. *Sharp*,[10] *Attorney-General* v. *Premier Line Ltd.*[11] In *Attorney-General* v. *Sharp* repeated fines for breach of a statute had proved ineffective to secure compliance with the law, and, irrespective of whether there was any public benefit to be obtained by observance of the particular statute, the Attorney-General was granted an injunction to restrain further breaches of the Act. The test laid down in *Attorney-General* v. *Kerr and Ball*[12] was whether the continued contravention of local by-laws would cause injury to the public; Lush J. was there concerned with an injunction to pull down a bungalow which had been illegally erected; the object of the injunction sought was to punish a breach of a local by-law that had been committed, and not to prevent threatened breaches of the law in the future.

The Attorney-General is the first law officer of the Crown, he is concerned with the observance and enforcement of the law, and should only be denied relief in exceptional circumstances: see *per* Devlin J. in *Attorney-General* v. *Bastow*.[13] Where a person is assisting in illegal conduct and the Attorney-General joins in a relator action as the only means of securing obedience to the law, the courts will pay great heed to his intervention and, while retaining their discretion, will grant him relief as a matter of course in the absence of exceptional circumstances—such as that an injunction would be ineffective or that there was bad faith on the part of the relators. The relevant principles are stated in Halsbury's Laws of England[14]; see also *Attorney-General* v. *Wimbledon House Estates Co. Ltd.*[15] If the Attorney-General is satisfied that the application for an injunction is in the public interest, and that the breaches warrant it, the court is not concerned with the triviality of the breaches. It is enough that a statute has been broken, and that the Attorney-General seeks redress for the breach.

Rose Heilbron Q.C. and *Ivor R. Taylor* for the first two defendants. In the exercise of his discretion the judge was entitled to refuse the injunction. He was right, in view of the triviality of the action, to exercise his discretion as he did.

The contentions for the Attorney-General are too broad and, on a true analysis of the cases, unsupported by authority. An injunction is never granted automatically; the courts must be free to adjudicate on the merits of each particular case: see *per* Farwell L.J. in *Attorney-General* v. *Birmingham, Tame and Rea District Drainage Board.*[16] In all the cases cited for the Attorney-General there was a substantial interference with public rights and consequential damage to the public. None of the cases cited supports the wide proposition that an injunction can be granted where no injury to the public has been caused. The cases fall into two lines; the first deals with the control by means of injunction of public bodies who exceed their statutory powers: *Attorney-General* v. *Birmingham and Oxford Railway Co.*[17]; *Attorney-General* v. *Sheffield Gas Consumers Co.*[18]; *Attorney-General* v. *Cockermouth Local Board*[19]; *Attorney-General* v. *Shrewsbury (Kingsland) Bridge Co.*[20]; *Attorney-General* v. *London and North-Western Railway Co.*[21]; *London County Council* v. *Attorney-General*[22]; *Attorney-General* v. *Birmingham, Tame and Rea District Drainage Board*[23] and *Attorney-General* v. *Westminster City Council.*[24]

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[9] [1900] 1 Q.B. 78; 16 T.L.R. 30, C.A.

[10] [1931] 1 Ch. 121; 46 T.L.R. 554, C.A.

[11] [1932] 1 Ch. 303; 48 T.L.R. 104.

[12] (1914) 79 J.P. 51; 12 L.G.R. 1277.

[13] [1957] 1 Q.B. 514, 522; [1957] 2 W.L.R. 340; [1957] 1 All E.R. 497.

[14] 3rd ed., vol. 21, p. 403.

[15] [1904] 2 Ch. 34; 20 T.L.R. 489.

Public bodies have a positive duty to the public, and acts in breach of their duty inherently tend to public injury in a very real sense. The above were all cases of serious injury to the public affecting their safety or health or interference with public amenities. Propositions laid down in those cases do not necessarily apply to the second line of cases, which deals with breaches of a statute by private individuals: *Attorney-General* v. *Ashbourne Recreation Ground*[25]; *Attorney-General* v. *Wimbledon House Estates Co. Ltd.*[26]; *Attorney-General* v. *Sharp*[27]; *Attorney-General* v. *Premier Line Ltd.*[28]; *Attorney-General* v. *Bastow*[29] and *Attorney-General* v. *Smith.*[30] In each of those cases the court decided on the particular facts of the case whether to exercise its discretion in favour of granting an injunction. In such cases the court is entitled to inquire into the seriousness of the injury caused to the public by the breach of the statute. If the court were not entitled to make such an inquiry, the Attorney-General would be imposing in a statute a penalty for persistent

[16] [1910] 1 Ch. 48, 61.

[17] (1851) 3 M. & G. 453.

[18] (1853) 3 De G.M. & G. 304; 43 E.R. 119.

[19] (1874) L.R. 18 Eq. 172.

[20] 21 Ch.D. 752.

[21] [1900] 1 Q.B. 78.

[22] [1902] A.C. 165.

[23] [1910] 1 Ch. 48.

[24] [1924] 2 Ch. 416.

[25] [1903] 1 Ch. 101; 19 T.L.R. 39.

[26] [1904] 2 Ch. 34.

[27] [1931] 1 Ch. 121.

[28] [1932] 1 Ch. 303.

[29] [1957] 1 Q.B. 514.

[30] [1958] 2 Q.B. 173; [1958] 3 W.L.R. 81; [1958] 2 All E.R. 557.

offenders that Parliament has not thought fit to impose—he would, in effect, be usurping the function of Parliament. It is the duty of the court to inquire into all the relevant circumstances of the case, and it can impose what penalty it desires without fear of interference from the executive. If the Attorney-General is dissatisfied, his remedy is to seek redress in Parliament. If the courts were to grant injunctions in relator actions as a matter of course whenever the Attorney-General sought them, the liberty of the subject would be endangered by a side-wind.

[SELLERS L.J. Flouting the law is not the liberty of the subject.]

The test is what harm has been caused by the particular acts of which complaint is made. The fact that a criminal offence has been committed is not decisive of the grant of an injunction: see *Attorney-General* v. *Birmingham and Oxford Railway Co.*[31] and *Attorney-General* v. *Sheffield Gas Consumers Co.*[32] Where the statute imposes a penalty for the breach, that is the sole remedy which can be employed against the offender.

[SELLERS L.J. That argument was rejected in *Attorney-General* v. *Sharp.*[33]]

In the case of a public body an injunction is the only appropriate remedy which can be used to prevent violations of its statutory obligations. In *Attorney-General* v. *Sharp* the breach was plying for hire without a licence; it was the type of obligation similar to that undertaken by a public body; it was not, as in the present case, the mere breach of the criminal law, for the illegal acts in *Attorney-General* v. *Sharp* were of a distinctly public nature. The Attorney-General as parens patriae can, of course, apply to the courts to restrain illegal acts of a public nature: see *Attorney-General* v. *Oxford, Worcester and Wolverhampton Railway Co.*[34] In the present case, however, the illegal acts are quite trivial and do not affect the public adversely.

The defendants are registered and licensed as street traders pursuant to section 61 of the Manchester Corporation Act, 1950. Their registration is revocable for misconduct, but it has not been revoked, so it would appear that the appropriate authorities cannot have considered the repeated breaches of section 102 of the Act of 1844 to have been a serious matter; moreover, the possibility of revocation means that an injunction is not the only effective remedy in the present case for securing compliance with the law.

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[31] 3 M. & G. 453.

[32] 3 De G.M. & G. 304.

[33] [1931] 1 Ch. 121.

[34] (1854) 2 W.R. 330.

To grant an injunction here would be unduly harsh and oppressive; it would prevent persons trading in an accustomed manner and would deny the public a useful facility in an attempt to revive the Act of 1844 when it has become obsolete. When that statute was enacted conditions were quite different and the streets and footpaths of Manchester were narrower. It is for the court to decide whether particular offences are too trivial to warrant an injunction restraining their commission. When the Attorney-General is called upon to exercise his discretion, he has the facts only as they are presented to him by the relators; he does not hear what the offender has to say. The court hears both sides and ascertains all the relevant facts, and facts might then appear which the Attorney-General never had an opportunity of considering. Whether in any particular case, therefore, the grant of an injunction is oppressive or proper is a matter for the court in the exercise of its discretion.

The judge was right when he said that there was a lack of bona fides. Selling flowers outside cemeteries and hospitals is the custom all over the country. There was an ulterior motive behind the prosecutions of the defendants—the removal of trade competitors. The Act of 1844 had as its object the good government and order of Manchester; it is not being used genuinely for that purpose in this case in which an injunction is being sought so as to stifle trade competition. [Reference was also made to *Lyons, Son & Co.* v. *Gulliver*,[35] and to Halsbury's Laws of England.[36]]

Lever in reply. Even were parts of the Act of 1844 obsolete, that would not mean that it should cease to be enforced or given effect; section 102, under which the prosecutions were launched, is used at the present time for dealing with a number of offences.

The fact that prosecutions were launched because of the complaints of shopkeepers does not mean that there has been any improper pressure exerted on the corporation. The shopkeepers were entitled to complain; it can make no difference to the result that trade competitors were responsible for the commencement of proceedings. The court is not asked to stifle fair trade competition, but to prevent unlawful trading, which by its very nature is unfair competition. [Reference was made to *Brownsea Haven Properties* v. *Poole Corporation*.[37]]

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[35] [1914] 1 Ch. 631; 30 T.L.R. 75, C.A.

[36] 3rd ed., vol. 21, p. 347.

[37] [1958] Ch. 574; [1958] 2 W.L.R. 137; [1958] 1 All E.R. 205, C.A.

The judge misdirected himself in saying that the breaches here were trivial. The authorities show that any breach of the law, if it is flagrantly committed, is an injury to the public if the law-breaker persists in his illegal acts.

Cur. adv. vult.

July 18. The following judgments were read.

SELLERS L.J. This is an appeal from the judgment of Salmon J. refusing to grant an injunction to restrain the defendants from placing or using any stall or other article upon any footway in Manchester, and from exposing for sale upon or near any footway therein any flowers or other article so as to obstruct the footway.

The defendants live, and trade during weekdays, at Dukinfield outside Manchester where they have a greengrocery and florist shop. On most, if not all, Sundays since about the middle of 1955 they have come into Manchester and sold flowers and fruit from stalls placed close to the gate of the Manchester Southern Cemetery. The judge has found that the defendants were carrying on a business which was to the advantage of the public as well as profitable to themselves, and that may well be so. It is, I think, not uncommon to find vendors of flowers and fruit somewhat similarly placed outside cemeteries, hospitals and nursing homes, and they provide a facility and a reminder to those who wish to visit these various places.

At first sight such a service might well appear to be useful and not harmful, and to be one which it would be unnecessary to curtail or prohibit.

Salmon J., no doubt, felt the force of such considerations. He was satisfied that in offering flowers for sale in the manner in which the defendants did they were not causing any nuisance or inconvenience to the public using the footway.

I, too, feel the force of these matters, but the difficulties of the present case arise when it has to be accepted, as it has, that the defendants, in doing what they did, were breaking the law. One of the arguments for the defendants was that it was an old law and that it was completely out of date, at least in respect of the matters involved here. Of that I am far from satisfied.

The Manchester Police Regulation Act, 1844, is still in force subject, perhaps, to some amendments which are not material to this appeal. The Manchester Corporation Act, 1950, s. 1 (2), recognises this. Section 1 (2) of the Act of 1950 provides that "The Manchester Corporation Acts, 1844 to 1946, and this Act "may be cited jointly as the Manchester Corporation Acts, 1844 "to 1950."

The Act of 1844 is entitled "An Act for the good government "and police regulation of the Borough of Manchester." It appears to control a multitude of activities, wayward or otherwise, of the citizens of Manchester. By section 102: "Every person "shall be liable to a penalty of not more than 40 shillings who "in any street shall commit any of the following offences." Innumerable matters are made offences by this section alone, amongst which there are included, about the middle of this long section: "Every person who shall place or leave any furniture, "goods, wares, or merchandise, or any cask, tub, basket, pail, "or bucket, or other article whatsoever, or place or use any "standing place, stool, bench, stall, or showboard on any foot-"way. . . . Every person who shall place, hang up or otherwise "expose to sale any goods, wares, merchandise, matter, or thing "whatsoever, so that the same shall project into or over any "footway or area, or beyond the line of any house, shop or "building at which the same shall be so exposed: every person "who shall slide upon any footway, or by standing, loitering, "or remaining together with other persons on any footway with-"out reasonable cause, or by hawking or exposing for sale any "shell- or other fish, greengrocery, meat, or other article, on or "near any footway, or by any other means shall obstruct or "incommode the free passage of any such footway, or who shall "insult, jostle, or annoy any inhabitant or passenger." Under that section of the Act, two separate offences were charged against both the defendants. One was the offence of "exposing flowers "for sale on the footway," and the other "did obstruct the free "passage of such footway and for using a stall on the footway, "contrary to section 102 of the Manchester Police Regulation "Act, 1844." [His Lordship then stated the facts relating to the convictions of the first two defendants, summarised the pleadings, and continued:]

Salmon J. carefully reviewed the law and the cases cited to him, which were by no means all of those cited in this court. The judge expressed himself in various passages as follows [1]: "But the present case, however, in my view depends "upon whether what the defendants are doing in any way injures

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[1] [1960] 1 Q.B. 31, 39; [1959] 3 W.L.R. 205; [1959] 2 All E.R. 393.

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"the public; and this is not a matter upon which the discretion "of any officer of the Crown can have any influence upon the "court. As I have indicated, I have no hesitation in holding "on the special circumstances of this case that the defendants "have caused no injury to the public. I do not, however, hold "that there are any means available other than an injunction to "prevent these defendants from doing what they are doing." The judge further said [2]: "in my judgment, it is the duty of the "court in all relator actions to inquire whether the acts done by "the defendants in truth injured the public." The question is whether the judge was right in the statement of the law and the application of it to the present case.

He also said [3] that he was uneasy about the circumstances in which the prosecutions were originally launched, and he seems to have taken that in part into consideration in holding that an injunction should not be granted.

The judgment does not find that there was a lack of good faith which, if established, might well justify no order for an injunction. Although such complaint as is made is clearly not against the Attorney-General but against those who prosecuted in the magistrates' court, I am not sure to what the judge was referring.

The defendants, apparently, were not the first to use the site adjacent to the entrance gates of the cemetery for selling flowers. There may have been long, though perhaps desultory, user. The objection to the defendants' activities there came initially from shopkeepers who carried on the same type of business in the immediate neighbourhood and who, apparently, were open on Sunday and found that their trade was wholly unprofitable because of the defendants' intervention on a site free from rent and rates. Not unnaturally the shopkeepers brought their complaint to various city councillors and the matter was discussed in the appropriate committee. The town clerk originally expressed the view in letters, to some of which the judgment refers, that no action could justifiably be taken against the defendants.

Reference was made to the Highway Act, 1835, but, apparently, it was the police who invoked the Act of 1844 and launched the first of these many prosecutions in February, 1956.

I agree with the judge that the mischief aimed at by any part of section 102 of the Act of 1844 could not have been unfair

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[2] [1960] 1 Q.B. 31, 42.

[3] Ibid. 43.

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competition, though some of the provisions would interfere, perhaps only to a minor extent, in the freedom of trading.

But I cannot see anything sinister in what was done. In more than one of the reported cases interested parties have raised objections and sought means of redress. If there was no breach of the law the magistrates would have so found. But they found infringements under both charges. There was an unsuccessful appeal to the Recorder of Manchester (Judge Sir Basil Neild), and, thereafter, the defendants frequently, if not invariably, pleaded guilty to the offence of erecting a stall on the footpath but not to obstruction. I do not think on this evidence that it could properly be held that some wrong motive had improperly caused the police to launch prosecutions under an Act or sections of it which had become obsolete or dead. The Attorney-General obviously regarded the Act of 1844, so far as relevant, as law which should be obeyed and enforced, and I do not feel able to hold otherwise.

The main argument has centred round the judge's decision that the injunction should be refused as no injury from the defendants' conduct has been shown, but rather a public advantage proved, and as the subject of complaint is trivial and not even inconvenience to the public has been shown. It is urged in support of the judgment that that view could properly be taken, and the refusal was well within the judge's discretion, and should stand.

It cannot, in my opinion, be anything other than a public detriment for the law to be defied, week by week, and the offender to find it profitable to pay the fine and continue to flout the law. The matter becomes no more favourable when it is shown that by so defying the law the offender is reaping an advantage over his competitors who are complying with it.

The penalty of 40s. established in 1844 has not proved an effective sanction. The two charges, so often made concurrently, arise from the same circumstances and, no doubt, it would have been regarded as inappropriate to make two fines to the full extent, and this does not seem to have been done. There is, however, no indication that, if the magistrates had fined to the maximum, it would have been effective to stop the offending.

The effort of the corporation in 1958 to increase the penalty was apparently defeated by sufficient interested opposing parties attending a town meeting which had to give its approval for the increase to be made.

It was not, I think, seriously submitted before this court, that in a suit of this character by the Attorney-General, the court had no discretion, but had peremptorily to make the order for which he asked.

In *Attorney-General* v. *Birmingham, Tame and Rea District Drainage Board*,[4] Farwell L.J. said: "It is for the Attorney-"General to determine whether he should commence litigation "but it is for the court to determine what the result of that "litigation shall be . . . that is to say, the court cannot say, "'you ought never to have instituted these proceedings': it must "listen to his application, and then adjudicate whether there "should be an injunction granted or not."

That, in my view, succinctly expresses the result of the authorities, and it has recently been emphasised by the passage quoted by the judge from Devlin J. in *Attorney-General* v. *Bastow*.[5]

I agree with Salmon J. that it is the duty of the court in making this adjudication to exercise its discretion quite independently of the discretion exercised by the Attorney-General, but, with respect, I think the judge went too far when he said,[6] further, that the Attorney-General is "in no better position to "obtain judgment in his favour than any other litigant claiming "an injunction."

The Attorney-General represents the public interest and acts accordingly, as Pollock M.R. pointed out in his judgment in *Attorney-General* v. *Westminster City Council*,[7] a case to which I briefly refer later.

Mr. Atkinson summarised his argument in submitting that on the authorities, when a man is persisting in a course of illegal conduct, and the Attorney-General comes to the court in a relator action asking for an injunction as the only means of securing obedience to the law, the court will at least pay great heed to his intervention and, while retaining a discretion to grant or refuse the relief he seeks, it will normally grant relief in the absence of some exceptional circumstances.

Miss Heilbron, in her argument, submitted that the cases followed two lines. She sought to distinguish the cases where the Attorney-General had intervened to prevent public bodies, statutory or otherwise, from exceeding their powers or not complying with their obligations, and the cases which had developed more particularly since the beginning of this century where the Attorney-General had intervened to enforce general or local laws or by-laws. She submitted, in effect, that the principles properly applied in the former have been improperly invoked in the later and different type of cases.

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[4] [1910] 1 Ch. 48, 61; 26 T.L.R. 93, C.A.; affd. [1912] A.C. 788, H.L.

[5] [1957] 1 Q.B. 514, 520, 521; [1957] 2 W.L.R. 340; [1957] 1 All E.R. 497.

[6] [1960] 1 Q.B. 31, 39.

[7] [1924] 2 Ch. 416, 420, 421; 40 T.L.R. 711, C.A.

In the case of public bodies, the intervention of the Attorney-General seeking an injunction was the only remedy to prevent infringement of powers whereas, in the second class of case, penalties were provided to enforce the statutory obligations.

In *Attorney-General* v. *Westminster City Council*,[8] one of the latest cases in the first category, Pollock M.R., in supporting the injunction granted by Tomlin J.,[9] held: "Having regard "to the position which the Attorney-General occupies before this "court, it does not seem to me to be possible to be questioned, "as a matter of discretion, whether or not he is entitled to the "redress which he asks in the public interest, in reference to a "matter upon which a public authority has exceeded its powers." That is, of course, after the court has been satisfied that the powers have been exceeded.

Warrington L.J. said[10]: "With regard to the injunction, it "was contended on behalf of the city council that the court ought "not in its discretion to grant an injunction, even at the suit of "the Attorney-General, unless the Attorney-General makes out "that that which the public body concerned is doing unlawfully "is of injury to the public." And further on, he said[11]: "If "the Attorney-General, acting on behalf of the public, in the "exercise of his discretion as a public officer, comes to the conclusion that he is justified in asking the court to restrain an "illegal act on the part of a public body, I do not think this court "is entitled to refuse the injunction merely because it is said that "there is no evidence of any public wrong being done. The real "result, if that argument were to be acceded to, would be that "in such a case there would be no means of preventing that kind "of illegal act on the part of the public body in question."

Likewise, a railway company has been stopped from exceeding a speed limit of 4 m.p.h. over a level crossing, imposed by statute, notwithstanding that the substituted speed of 10 m.p.h. meant less delay over the crossing and to that extent at least benefited the public who might otherwise be longer delayed: see *Attorney-General* v. *London and North Western Railway Co.*[12] The cases cited where the injunction has been granted to prevent public and statutory bodies from exceeding their powers are not strictly applicable to the present case. Further, *Attorney-General* v. *Shrewsbury (Kingsland) Bridge Co.*,[13] in which an injunction was granted to restrain interference with a public highway and a public navigable stream by illegal acts of obstruction, was a case where damage to the public was clearly to be inferred.

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[8] [1924] 2 Ch. 416.

[9] [1924] 1 Ch. 437; 40 T.L.R. 296.

[10] [1924] 2 Ch. 423, 424.

[11] Ibid. 424.

But if such types of cases are disregarded, I do not think it follows that conduct, which is not shown to be an injury to the public, in the sense used, cannot be restrained even if it involves persistent and deliberate disregard of the law.

I would turn to cases more directly in point. *Attorney-General* v. *Sharp*[14] was decided in this court. It also arose under the Manchester Police Regulation Act, 1844. The headnote reads: "By the Manchester Police Regulation Act, 1844, the "Manchester Corporation, who were the licensing authority for "the City of Manchester, were empowered by the Act to license "hackney carriages (including motor omnibuses) plying for hire "within the city. The Act provided for penalties for plying for "hire without a licence. The defendant, who was the owner or "proprietor of motor omnibuses, had applied for and had been "refused a licence by the corporation. He had nevertheless continued to ply for hire in the city with his motor omnibuses, "and he and his employees had been repeatedly fined for offences "under the Act. In an action brought by the Attorney-General "at the relation of the corporation for an injunction to restrain "the defendant from continuing to ply for hire in the city without a licence" it was held that an injunction would lie. This court rejected the argument, advanced again here on behalf of the defendants, that the court had no jurisdiction to grant an injunction or any other remedy if the Act imposed, as it does, a fine for the offence. I quote Lord Hanworth M.R.[15]: "we must hold "that there is a remedy by injunction, and that the mere fact "that the imposition of a fine is available under the statute does "not exclude the right which is sought by the Attorney-General," and Lawrence L.J. said[16]: "If the learned judge had jurisdiction, it cannot, I think, be reasonably open to doubt that it was

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[12] [1900] 1 Q.B. 78; 16 T.L.R. 30, C.A.

[13] (1882) 21 Ch.D. 752.

[14] [1931] 1 Ch. 121; 46 T.L.R. 554, C.A.

[15] [1931] 1 Ch. 121, 133.

[16] Ibid. 133.

"rightly exercised in the circumstances of the present case. The "defendant has deliberately and persistently committed breaches "of the statutory obligations imposed upon him for the benefit "of the public. Before this action was brought the defendant "and his employees had, at the instance of the Corporation of "Manchester, been summoned and fined no less than 60 times "for breaches of these obligations, and it is plain that the defen-"dant intends to pursue his illegal course of conduct unless "restrained by injunction." Those words fit precisely the present case.

Then, in *Attorney-General* v. *Premier Line Ltd.*,[17] there had been offences committed under the traffic regulations imposed by the Road Traffic Act, 1930. The material part of the headnote reads: "The defendants commenced to operate a service of "express coaches over a route between London and Aylesbury "on February 26, 1931, and applied in the prescribed manner for "the grant of a road service licence from the Commissioners "of the Eastern Area through which the route passed before "March 31, 1931, but their application was refused and an appeal "to the Minister from the refusal dismissed. The defendants "were later prosecuted and convicted at petty sessions for run-"ning their service without a road service licence, but, notwith-"standing the conviction, continued to do so." The Attorney-General took proceedings.

Eve J., who tried that case, dealt with the matter very fully in finding in favour of the Attorney-General, and I propose to read a substantial part from his judgment[18]: "The Attorney-General "has been invoked, and he has intervened in order to assert, "not only the rights of the three relators"—in that case they were the competitors who were interested—"joined with him as "co-plaintiffs, but of the public at large. The public is concerned "in seeing that Acts of Parliament are obeyed, and if those who "are acting in breach of them persist in so doing, notwith-"standing the infliction of the punishment prescribed by the Act, "the public at large is sufficiently interested in the dispute to "warrant the Attorney-General intervening for the purpose of "asserting public rights, and if he does so the general rule no "longer operates; the dispute is no longer one between indi-"viduals, it is one between the public and a small section of the "public refusing to abide by the law of the land. The point is

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[17] [1932] 1 Ch. 303; 48 T.L.R. 104.

[18] [1932] 1 Ch. 303, 313.

"concluded against the defendants by the recent decision of the "Court of Appeal in *Attorney-General* v. *Sharp*.[19]

"This conclusion drives Mr. Carr back to his second line of "defence, which is that the remedy by way of injunction is a "discretionary one and ought not to be imposed in this case. I "cannot accept that view. This is not the case of a trivial or "solitary invasion of the plaintiff's rights. In such cases the "granting of an injunction in the absence of any indication on "the part of the defendant to repeat the offence might well be "regarded as an excessive punishment to inflict, but here I have "to deal with defendants, who, notwithstanding frequent warning, the refusal of their licence and a conviction recorded "against them for the offence of operating their vehicles without "a licence, nevertheless continued to commit day by day, and "many times a day, the same offence, and even now, although "they have in fact discontinued the service for the time being, "have so far given no indication of their intention to abandon it "permanently, and in such a case the only proper remedy is "obviously an injunction."

Then in *Attorney-General* v. *Bastow*[20] Devlin J. said: "The "Attorney-General, as I say, is the officer of the Crown who is "entrusted with the enforcement of the law. If he, having "surveyed the different ways that are open to him for seeing that "the law is enforced and that it is not defied, has come to the "conclusion that the most effective is to ask this court for a "mandatory injunction—and I am satisfied that the very nature "of a relator action means that he has surveyed those ways and "has come to that conclusion—then I think that this court, once "a clear breach of the right has been shown, should only refuse "the application in exceptional circumstances."

The judge expressed the view[21] that the circumstances here were most exceptional, I think on the grounds that, as he held, there was no injury to the public and that, indeed, no member of the public had been in the slightest degree inconvenienced. That view is disregarding the complaining shopkeepers and, more particularly, the effect on the administration of and respect for the law if the defendants can continue in the future on the same lines as in the past, laugh at the law, and say they are immune from its restraints so long as they pay recurringly a small price for their immunity.

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[19] [1931] 1 Ch. 121.

[20] [1957] 1 Q.B. 514, 522.

[21] [1960] 1 Q.B. 31, 43.

In *Attorney-General* v. *Kerr and Ball*[22] Lush J. expressed this view which was relied on by the judge and the defendants, "Obedience to by-laws even as to the construction of a dwelling-"house is, I think, a public duty, and disobedience to their "instruction is prima facie a public wrong but the granting of an "injunction is discretionary as was admitted," and he also said[23]: "I have to consider whether a public injury has been "done by continued contravention of the by-laws, and whether "it is desirable under all the circumstances that an injunction "should be granted." He did not grant an injunction because he found the bungalows were healthy and fit for occupation and, if he ordered them to be removed, tents would be erected in their place. It was clearly a case where an injunction could properly be refused.

In all the circumstances of the present case, my view is that it is desirable that the defendants should be stopped from deliberately flouting the law, and I think the Attorney-General has adopted a course, suited to the circumstances, which the courts should uphold, and I would allow the appeal and grant an appropriate injunction.

PEARCE L.J. I agree. In very full and fair arguments many old cases have been cited that show the development of the views taken by the courts in relator actions. It is now firmly established that where an individual or public body persistently breaks the law, and where there is no person or no sufficient sanction to prevent the breaches, these courts in an action by the Attorney-General may lend their aid to secure obedience to the law. They may do so whether the breaches be an invasion of public rights of property or merely an invasion of the community's general right to have the laws of the land obeyed. "The Attorney-"General," said Lord Hatherley L.C. in *Attorney-General* v. *Ely, Haddenham and Sutton Railway Co.*,[24] "represents the "whole public in this sense, that he asks that right may be done "and the law observed. . . . The question is, whether what has "been done has been done in accordance with the law; if not, the "Attorney-General strictly represents the whole of the public in "saying that the law shall be observed."

The defendants contended that where the Act that created the offence provides the penalty, the general rule applies, the only remedy is that provided by the statute, and, therefore, an injunction cannot or at the least should not be granted in the present case. But, as Eve J. pointed out in *Attorney-General* v. *Premier Line Ltd.*,[25] the Attorney-General is asserting the rights of the public which is concerned in seeing that Acts of Parliament are obeyed, and the general rule, therefore, no longer operates. The dispute is not between the individuals, but between the law breaker and the public. In *Attorney-General* v. *Sharp*[26] arguments similar to those of the present defendants were put forward without success. In that case, which has certain similarities to the case before us, it was held that the court had jurisdiction to grant an injunction to prevent the defendant from plying for hire with his omnibuses without a licence. "The defendant," said Lawrence L.J.,[27] "has deliberately and "persistently committed breaches of the statutory obligations "imposed upon him for the benefit of the public. Before this "action was brought the defendant and his employees had, "at the instance of the Corporation of Manchester, been summoned and fined no less than 60 times for breaches of "these obligations, and it is plain that the defendant intends to "pursue his illegal course of conduct unless restrained by injunction. . . ." And later he said this[28]: "In the present case "moreover the defendant is wilfully persisting in an illegal "course of conduct which has become and if no injunction be "granted will continue to be a permanent habit. In these "circumstances I think that the only appropriate remedy is by "way of injunction at the instance of the Attorney-General."

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[22] (1915) 79 J.P. 51, 53; 12 L.G.R. 1277.

[23] Ibid.

[24] (1869) L.R. 4 Ch. 194, 199.

The same is true of the defendants in the present case. Between them, they had at the date of the trial been convicted and fined on 237 summonses, and they admitted their intention to continue their course of action. For the profits derived from their breaches of the law exceed the penalties which can be inflicted on them. If, therefore, no injunction is granted, the law must (unless and until Parliament intervenes by amending the statute) confess itself defeated and leave them free to break the law, merely levying on their profits the small toll that the existing penalties allow.

It is not, of course, desirable that Parliament should habitually rely on the High Court to deter the law breaker by other means than the statutory penalties instead of taking the legislative step

[25] [1932] 1 Ch. 303, 313.
[26] [1931] 1 Ch. 121.
[27] Ibid. 133.
[28] Ibid. 137.

of making the penalties adequate to prevent the offence which it has created. Especially is this so where the offences are of a trivial nature. Yet it is, on the other hand, highly undesirable that some member of the public should with impunity flout the law and deliberately continue acts forbidden by Parliament. And in cases where, under the existing law, this court alone can provide a remedy, it should in general lend its aid to enforce obedience to the law when that aid is invoked by the Attorney-General on behalf of the public.

It was argued for the Attorney-General that, once the breach had been proved, this court must order an injunction, or at the least ought to do so because the Attorney-General has brought the action in the exercise of his discretion. In its extreme form the argument is untenable. For, although the bringing of the action is a matter for the discretion of the Attorney-General, the decision of it is for the courts (see *per* Farwell L.J. in *Attorney-General* v. *Birmingham, Tame and Rea District Drainage Board* [29]). When the Attorney-General decides to bring the action, he has not heard both sides of the matter and he has perforce to exercise his discretion ex parte. It is for the court to hear both sides and, having done so, to exercise its own discretion. Many things may have appeared by evidence, many cogent arguments may have been adduced, that may not have been within the contemplation of the Attorney-General when the proceedings were launched. It could be that in some cases, had he known of these, he would not have brought the proceedings. But be that as it may, it is for the court in its discretion, having heard both sides, to decide whether to grant an injunction.

Lord Halsbury L.C.'s observations in *London County Council* v. *Attorney-General* [30] dealt with the Attorney-General's jurisdiction. The Attorney-General exercises an administrative discretion in deciding whether the action should be brought. The court does not inquire into the rightness of that decision. The bringing of the proceedings has shown that in the opinion of the Attorney-General the acts warrant an injunction. This opinion, though ex parte, will obviously carry weight with the court. Where, as in the present case, deliberate and still continuing breaches of the law have been proved, the court will in the exercise of its discretion normally grant an injunction, unless after hearing both sides it comes to the conclusion that the matter is too trivial to warrant it, or that an injustice will be caused by it, or that there is some other good reason for refusing to enforce the general right of the public to have its laws obeyed. I do not, with all respect, agree with the judge when he says [31] that the Attorney-General is in no better position than any other litigant. For the Attorney-General represents the community, which has a larger and wider interest in seeing that the laws are obeyed and order maintained.

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[29] [1910] 1 Ch. 48, 61, C.A.

[30] [1902] A.C. 165, 168; 18 T.L.R. 298, H.L.

It is this wider element that is apt to be overlooked or undervalued when one considers injury to the public merely in terms of immediate injury. In *Attorney-General* v. *Sharp* [32] there was no injury to the public in this sense. In that case, probably some extra omnibuses were, on the short view, a convenience rather than otherwise, yet an injunction was granted. There are many statutes and by-laws whose breach by one man only, even though repeated, would do no injury (in the narrower sense) to the public. Indeed, it is one of the difficult problems of administration to decide what acts, harmless in themselves in isolated instances, must be forbidden in the interest of public order and well-being. And a breach with impunity by one citizen leads to a breach by other citizens, or to a general feeling that the law is unjustly partial to those who have the persistence to flout it. Moreover, a breach of one law leads to a breach of another. It is in this respect that I find myself unable to agree with the judge in his finding that the acts done by the defendants do not tend to injure the public.

The administration of the city wishes to enforce this particular law on all alike, and to prevent stalls from projecting into the footways of the city. I see no reason to doubt the sincerity of that wish. No doubt the agitation of those whose pockets were affected had had an effect in stirring up the authorities, but that has been so in many successful relator actions.

I have considerable sympathy with the judge's feeling that the defendants' acts are trivial in themselves and insufficient to justify an injunction; in one sense and from one point of view they are. But, on the wider view of the matter, the public ought not, in the present case, I think, to be denied their general and not unimportant right to put an end to continuing and deliberate breaches of the statute.

I would therefore allow the appeal.

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[31] [1960] 1 Q.B. 31, 39.

[32] [1931] 1 Ch. 121.

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ATTORNEY-GENERAL
v.
HARRIS.

DEVLIN L.J. (read by Sellers L.J.). I agree with both the judgments which have been delivered.

Appeal allowed with costs against the first two defendants, and injunction granted against them.
Undertaking by third defendant in court below to stand.
No order for costs nor injunction against third defendant.
Leave to appeal to the House of Lords granted.

Solicitors: *Sharpe, Pritchard & Co. for Mr. Philip B. Dingle, Town Clerk, Manchester; Mr. Edward F. Iwi for Julian S. Goldstone & Co., Manchester.*

N. P.

C. A.

1960
March 23, 24, 25;
April 4.

Hodson, Willmer and Devlin L.JJ.

A. MARTIN FRENCH *v.* KINGSWOOD HILL LTD.

[1958 F. No. 782.]

Practice—Payment into court—Counterclaim—Plea of equitable set-off by defendants—Payment into court by defendants accepted by plaintiffs—Whether balance of counterclaim extinguished by such payments—R.S.C., Ord. 22, *r.* 1 (1).

The plaintiffs, a firm of surveyors, claimed £1,320 against the defendants as the balance of an account for professional services. The defendants counterclaimed £2,960 as damages for negligence and breach of duty, relied on their counterclaim as an equitable set-off and paid £927 into court under R.S.C., Ord. 22, r. 1 (1).[1] The plaintiffs took this sum out of court and amended their defence to counterclaim by alleging that by reason of the payment into court the cause of action relied on by the defendants by way of set-off and counterclaim had been satisfied and extinguished. On a trial of this issue an official referee gave judgment for the defendants. On appeal:—

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[1] R.S.C., Ord. 22, r. 1: "(1) In "any action . . . the defendant may "at any time after appearance upon "notice to the plaintiff pay into court "a sum of money in satisfaction of "the claim or (where several causes "of action are joined in one action) "in satisfaction of one or more of the "causes of action; provided that with "a defence setting up tender before "action the sum of money alleged to "have been tendered must be brought "into court. . . . (3) The notice "shall be in Form 3 in Part II of "Appendix B. . . ."

R.S.C., Appendix B, Pt. II, 3: "Take notice that the defendant . . . "has paid into court . . . and says "that that sum is enough to satisfy "the plaintiff's claim. . . ."

Held, dismissing the appeal, that the conclusion of an action by a payment into court was quite different from its conclusion by a judgment, and created no estoppel; that, under the language of Ord. 22, r. 1 (1), a payment in by a defendant represented the sum calculated to satisfy the plaintiffs' claim as it then stood, and did not permit the defendant to pay in a balance between the plaintiffs' claim and the defendants' set-off and counterclaim. Consequently, the cause of action in the counterclaim had not been extinguished or satisfied.

Coote v. *Ford* [1899] 2 Ch. 93; 15 T.L.R. 378, C.A. and *Hanak* v. *Green* [1958] 2 Q.B. 9; [1958] 2 W.L.R. 755; [1958] 2 All E.R. 141, C.A. applied.

APPEAL from His Honour W. K. Carter Q.C., Official Referee.

The following statement of facts is taken from the judgment of the court, delivered by Devlin L.J.: On June 17, 1958, the plaintiffs issued a writ against the defendants claiming £1,320 12s. 8d., the balance of an account rendered to them for work done as surveyors and valuers. On July 30 the defendants filed a defence and counterclaim. By their defence they alleged that the fees claimed were unfair and unreasonable and that some of the disbursements had not been made; and by their counterclaim they sought to obtain damages, which they estimated at £2,960, for breach of duty by the plaintiffs. In their defence they relied upon their counterclaim as an equitable set-off, as under the authority of *Hanak* v. *Green* [2] (in his Lordship's view) they were entitled to do. On August 8, 1958, and March 10, 1959, the defendants made payments into court which together totalled £927. On March 23, 1959, the plaintiffs took these sums out of court and so undoubtedly disposed of their claim; their contention was that this disposed of the counterclaim also. So as to raise this point, they applied for leave to amend their defence to the counterclaim. By the amendment they alleged that, since they had accepted the sums paid into court in satisfaction of their claim subject to and reduced by the set-off, the cause of action relied on by way of set-off and counterclaim had been satisfied and extinguished. They were given leave to amend in these terms and it was ordered that the plea raised by the amendment should be tried as a preliminary issue. It was so tried, and the official referee gave judgment against the plaintiffs, holding that the cause of action in the counterclaim had not been extinguished or satisfied. The plaintiffs appealed.

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[2] [1958] 2 Q.B. 9; [1958] 2 W.L.R. 755; [1958] 2 All E.R. 141, C.A.

Roy Wilson Q.C. and *Adrian Hamilton* for the plaintiffs.
Frederick Hallis for the defendants.

Roy Wilson Q.C. and *Adrian Hamilton* for the plaintiffs. The relevant Rules of the Supreme Court are Ord. 19, r. 3, Ord. 22, rr. 1, 2 (2) and Ord. 21, r. 16. As regards Ord. 22, rr. 1, 2 (2) and Ord. 21, r. 16, it is submitted that these relate to procedure only. It is not suggested that this is an automatic stay under Ord. 22, r. 2. As a matter of procedure the counterclaim in the present case can proceed, but as a matter of substance on the present facts it is bound to be defeated by the defence of the compromise effected by the payment into court after the plea of set-off and by the acceptance of that payment in.

A defendant is in no better position if he proceeds to establish his cause of action by counterclaim than if he proceeds by way of a separate cross-action: *Stumore* v. *Campbell & Co.*,[3] *per* Lord Esher M.R., and *McGowan* v. *Middleton.*[4] Could it be suggested, if the defendants had used their right to damages by way of set-off only in their proceedings, that they could have brought a separate action to recover those damages after the acceptance of their payment in?

The plaintiffs rely on the following propositions:

(1) It is well settled that a claim for unliquidated damages can be used as a defence by way of set-off to extinguish or reduce pro tanto a plaintiff's claim. Since the Judicature Act, 1873, equitable set-off has been one of the available defences: see *Hanak* v. *Green*,[5] when the question of the effect of a set-off is extensively dealt with and much authority is cited.

(2) A defendant who has a cross-claim must elect whether he will rely on the defence of set-off, either alone or with a counterclaim (as the defendant did in the present case), or whether to use it as a cross-claim only, whether by counterclaim or by separate action: *Davis* v. *Hedges.*[6]

(3) If the defendant elects to rely on his cross-claim in his defence as a set-off, and actually uses it in diminution of the plaintiff's claim, his right of action is extinguished even if the reduction obtained by it is inadequate: *Davis* v. *Hedges*,[7] *per* Hannen and Lush JJ.

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[3] [1892] 1 Q.B. 314, 316; 8 T.L.R. 99, C.A.

[4] (1883) 11 Q.B.D. 464.

[5] [1958] 2 Q.B. 9.

[6] (1871) L.R. 6 Q.B. 687.

[7] Ibid. 692, 693.

(4) If the defendant does elect to use his right of action as a set-off as well as a counterclaim, and the counterclaim is held to exceed the claim, the judgment is only for the balance of the counterclaim over the amount used to extinguish the claim by way of set-off: *Hanak* v. *Green*.[8] It would be contrary to this principle for the present defendant to proceed on his counterclaim and recover the *same* damages as he has already used to reduce the plaintiff's claim.

(5) The effect of a payment in and acceptance of that payment in is to constitute a special form of compromise, according to the rules of court, settling the issues raised on the pleadings in respect of the claim in satisfaction of which the money is paid in. Its purpose is to prevent an adjudication (*Coote* v. *Ford*,[9] *per* Stirling J.), and it will only achieve this purpose if it has the same effect on the issues as a judgment, including the effect of extinguishing the defendant's causes of action relied on by way of set-off. The payment in is the price of peace, and if it is accepted it means that both sides lay down their weapons on the issues raised in the statement of claim and the defence. The compromise achieved uses up the defences as effectually as they would have been used up on an adjudication. The result is that a position equivalent to res judicata is achieved, without a trial and without any admissions on either side.

[DEVLIN L.J. I suggest that the whole question turns on the construction of Order 22, r. 1, and that none of the authorities lay down any broad principle on which to decide this case.]

Payment in and acceptance effect a form of statutory contract putting an end to the dispute. The words "in satisfaction of "the claim" in sub-rule (1) mean in satisfaction of the claim taking into account all the various answers to the claim raised in the defence. In considering the effect of the statutory contract regard must be paid to the issues raised on the pleadings at the time the contract was concluded. If the defence of set-off is not taken into account, no effect will be given to the fact that the defendant by his defence has elected to use his cross-claim by way of set-off.

(6) The cause of action relied on by way of set-off and by way of counterclaim is identical and only one head of damage is alleged. The only occasion when one head of damage can be split and the severed portions used separately is where, for example, bad workmanship is used as a defence in reduction of

[8] [1958] 2 Q.B. 9.

[9] [1899] 2 Ch. 93, 99.

the price, as it was in *Mondel* v. *Steel*[10] on the principle now embodied in section 53 of the Sale of Goods Act, 1893. In that unique case an action can be brought for damages, reduced by the amount already used in reduction of the price. No reduction of the price is claimed here and there are no severable heads of damage. The same cause of action cannot be used twice for different parts of the same head of damage: *Rowntree* v. *Allen.*[11]

(7) The plaintiff's contentions allow a defendant to act in all cases in such a way as to produce a just result by a payment into court. The possibilities are: (a) If he has faith in his cross-claim, he can elect to rely on his set-off and counterclaim as a complete defence and make no payment in; (b) if he considers that his cross-claim is less than the claim, he can elect to set-off and pay in the balance; or (c) if in doubt he can elect not to rely on his set-off and counterclaim only, if necessary admitting the claim and applying for a stay of execution pending the trial of the counterclaim.

On the other hand, if the official referee's decision is right, a defendant can never strike a balance between claim and cross-claim and pay in the balance. Furthermore, a plaintiff is put in a dilemma, since if he takes out the sum paid in after a plea of set-off he is liable for the full amount on any counterclaim; but if he does not take out the sum in court, and recovers less than the amount paid in after the set-off is taken into account, he risks paying the costs after payment in.

Order 22, r. 1, has to be considered in the light of these propositions. The purpose of the rules is to provide an inexpensive means of settling a dispute as conclusively as if there had been an adjudication. An adjudication would have taken into account the election of the defendant to rely on his set-off. The statutory machinery for a settlement by payment in and acceptance will not achieve its object if it ignores the fact that a defendant may elect to rely on his right of set-off and if it denies a defendant the right to stand on that election and pay into court the balance of the claim reduced by the set-off.

[*Chell Engineering* v. *Unit Tool and Engineering Co. Ltd.*[12]; *Morgan & Son Ltd.* v. *Martin Johnson & Co. Ltd.*[13]; *Childs* v.

[10] (1841) 8 M. & W. 858.

[11] (1935) 41 Com.Cas. 90.

[12] [1950] W.N. 146; [1950] 1 All E.R. 378, C.A.

[13] [1949] 1 K.B. 107; 64 T.L.R. 381; [1948] 2 All E.R. 196, C.A.

Blacker [14]; *Sharpe* v. *Haggith* [15]; *Stephens & Co.* v. *Allen* [16] were also referred to.]

Frederick Hallis for the defendants. The question is: what is the meaning of "satisfaction" in Order 22? The argument of the plaintiffs, which sets up a notional estoppel, is based on a misconception of the nature of payment in and out of court; they seek to set up the proceeding as a quasi-adjudication which takes the set-off into account, puts an end to all claims in the litigation and imposes a kind of estoppel on their further pursuit. But payment in and out is the creation of the rules; a plaintiff's claim is satisfied without any proceeding in court or admission on either side. The object is to enable the parties to bring an end to the proceedings by their own act, and the result is a settlement by the act and will of the parties.

The meaning and intention of the parties when making and accepting the offer are to be derived from the language of the relevant rules and statutory notices of offer and acceptance passing between them. The plaintiffs can only succeed in the present issue if they can establish either an accord and satisfaction of all the claims of both sides, or an estoppel based on a quasi-adjudication. Payment in and out do effect an accord and satisfaction; the parties agree to settle the matter, but the settlement is effected within the terms and language of the rules. There may be various motives for making a settlement, such as the risks and uncertainties of litigation, especially when there are conflicting claims, set-offs and counterclaims, but in deciding this question it is not motives which count but the meaning and effect of the rules and the prescribed notices which the parties must use. The burden is on the plaintiffs to show that the payment in and out was in "satisfaction" of something more than their claim in the statement of claim, and the language used does not support such a contention; it indicates that the defendants' payment relates to the plaintiffs' claim and to that only. As to an estoppel, there has been no adjudication, but the tender and acceptance of a peace offering quite irrespective of the merits, which can in no way be assimilated to an adjudication.

The plaintiffs have contended that the effect of the decision below is to deprive a litigant of his right to avoid the payment of costs by payment in so as to satisfy a claim less a set-off; but an

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[14] [1954] 1 W.L.R. 809; [1954] 2 All E.R. 243, C.A.

[15] (1912) 28 T.L.R. 194; 106 L.T. 13.

[16] [1899] 2 Ch. 93, 99; 15 T.L.R. 375, C.A.

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argument ab inconvenienti is far from conclusive, and their contention itself involves great difficulties in certain circumstances. Suppose that a plaintiff has several separate and independent causes of action, and the defendant has a cross-claim, also quite independent, and wishes to make a payment in. If it is to involve also his counterclaim by way of set-off, the result is great confusion and embarrassment to both parties in making a sensible and practicable attribution to the payment in and taking out. [*Amon* v. *Bobbett*[17] was also referred to.]

Wilson Q.C. replied.

Cur. adv. vult.

May 5. The following judgment was read.

Hodson L.J. The judgment of the court will be given in the judgment which Devlin L.J. is about to read.

Devlin L.J. read the following judgment of the court, in which he stated the facts and continued: It is, of course, clear that, if judgment is delivered upon a claim that is subject to a set-off, both the claim and the set-off are disposed of. The cause of action in the set-off cannot thereafter be raised in any new action; neither can it be raised by counterclaim, which is in substance a separate action. The matter is res judicata.

But the conclusion of an action by payment into court is something quite different from its conclusion by a judgment. In *Coote* v. *Ford*[1] Stirling J. clearly explained the effect upon a cause of action of the taking out of money which has been paid in in respect of it. The payment in implies no admission about the merits of the cause of action; there has been no adjudication upon it and therefore no estoppel is created. What has happened is simply that the claim arising out of the cause of action has been settled, just as it would have been settled by a payment under a compromise.

The plaintiffs accept this distinction and have proceeded accordingly. Contending as they do that an abandonment of the set-off was an essential part of the compromise effected by the payment in, they claim to treat the matter just as if the defendants' claim had been satisfied by a money payment; and so they rely upon the compromise as an additional defence made available to them after action brought.

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[17] (1889) 22 Q.B.D. 543.

[1] [1899] 2 Ch. 93, 99; 15 T.L.R. 378, C.A.

Are the plaintiffs right in their contention that the payment in necessarily involves the extinction of the set-off? When a defendant who has pleaded a set-off pays money into court, does he pay in to satisfy the plaintiff's claim, ignoring the set-off? Or does he pay in to satisfy the claim less the set-off? If the latter, then, if the offer is accepted and the money taken out, the set-off must be extinguished, for it has been used as an alternative to money to pay off the plaintiff, and a counterclaim based on the same cause of action must perish with it. If the former, the set-off is unaffected and the claim embodied in it can be pursued by counterclaim or otherwise.

Mr. Wilson contends that a payment in in these circumstances must inevitably have the effect of satisfying the claim less the set-off. A defendant, he says, is not obliged to use a cross-claim as a set-off; but if he elects to do so, it is impossible for him thereafter to deal with the claim otherwise than as a claim subject to a set-off.

We do not think that the answer is to be found by the application of a rigid principle of this sort. A payment into court is simply an offer to dispose of the claim on terms. If the defendant were free to formulate the terms himself, he could make his offer in whatever form he liked. He could offer either to settle the claim less the set-off, or he could offer to settle the claim by itself, leaving the set-off alive to form the subject of a counterclaim or another action. But if he seeks to effect his compromise under the rules which permit a payment into court, he must make his offer according to the rules. So the answer to the question must be sought by ascertaining and construing the terms of the rule under which the payment into court is made. That means construing R.S.C., Ord. 22, r. 1 (1), for that rule not only provides for payment in but also prescribes the form of words that must be used in the notice of payment in. The form of words used, and which had to be used in this case, is: The defendants "say that that sum . . . is enough to satisfy the plaintiff's "claim." The plaintiff's *claim* cannot be affected by the amount of the set-off. What he *recovers* may be, but not, unless he admits the set-off, what he claims. The defendant, when he pays into court in these terms, is not therefore paying in such sum as he thinks the plaintiff may be likely to recover at the end of the day, but a sum to satisfy the plaintiff's claim as it then stands. Ord. 22, r. 5, makes provision for the plaintiff paying in against the counterclaim, if he wants to, but there is no provision for balancing one against the other.

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The natural meaning of the words used in the rule and in the notice served under it is therefore against Mr. Wilson's contention. If he is to succeed, he must show that the words in the rule "the plaintiff's claim" do not mean what they appear to mean, but ought to be construed as "the plaintiff's claim less "the defendant's claim." Alternatively, he must show that when the defendants say that "that sum is enough to satisfy "the plaintiff's claim," they mean "that sum together with the "value of the set-off." Mr. Wilson submits that if one looks at the purpose of the rule, one ought to give it an interpretation of that sort. An offer of settlement can be made and accepted or refused without the assistance of any rule. The purpose of the rule is to enable the offer to be recorded in such a way that it can be used to affect the order for costs. So that he can save himself costs, the rules give a defendant the right to pay in, and a defendant has also under the rules a right of set-off. If he is not allowed to pay in a sum to satisfy a claim less set-off, he is, Mr. Wilson argued, being deprived of the exercise of one or other of these rights. Suppose a plaintiff has a claim for £75,000 and the defendant a set-off for £70,000. The defendant believes that he will be able to knock £2,000 off the plaintiff's claim so that the plaintiff will on balance recover £3,000. The defendant ought, Mr. Wilson says, to be able to pay into court £3,000. If, in order to get the benefit of payment in, he has to find £73,000, he is losing the benefit of his set-off.

This sort of situation can be made to sound more inconvenient than it really is. Payment into court is not the only method which a defendant may have to save himself costs, though it certainly is the most satisfactory. It is not a method that is always available; it cannot be used, for example, in arbitrations or appeals. A written offer which the court can take into consideration after the hearing has then to be made to serve the same purpose as nearly as may be. It is not a conclusive argument against a particular construction of a rule that under it the utility of the rule is less than it might be.

If matters of this sort are to be considered, arguments can be advanced on the other side which show that in certain circumstances Mr. Wilson's construction is an inconvenient, if not an impossible, one. Suppose that a plaintiff has four separate causes of action, each leading to a separate money claim, and the defendant has, as here, a counterclaim, unconnected with any of the plaintiff's claims, which he uses as an equitable set-off. The defendant pays in, as he must do if he wishes to pay in at all, separate sums in respect of each cause of action. To which sum is the value of the set-off to be taken as a notional addition? Which of the four claims is it to be taken as diminishing? Or is it notionally divided among them all? If the plaintiff takes out one sum and not others, what is the effect on the set-off? Mr. Wilson's solution of this difficulty is to say that the whole value of the set-off must be deemed to be allocated to the cause of action in respect of which a sum is first taken out. We can see no warranty for this solution in preference to any other; but if it be correct, it makes the calculation of the sum to be paid in so difficult for the defendant as to make the procedure useless to him. He cannot tell in advance which sum the plaintiff will take out and which he will leave in. If the defendant underpays on claim A, hoping that the value of the set-off may be used to supplement it, and pays adequately on claim B, the plaintiff may take out the adequate sum on claim B and the set-off will be automatically extinguished with nothing to show for it; the plaintiff can then proceed on claim A and the defendant will then have to make good the underpayment or risk losing the costs.

It seems to us that in the end we must come back to the plain meaning of the language used, and on that Mr. Wilson fails. The rules as drafted do not permit a defendant to strike a balance between the plaintiff's claim on the one side and a set-off and counterclaim on the other, and to pay in to satisfy the balance. It might be a great convenience and advantage to litigants if they did, and we think that the rules committee might be invited to consider whether an amendment could not be made, giving the defendant an option under which he could, so to speak, offer up his cross-claim as well as a sum of money in settlement. But we have to apply the rules as they stand. Unfortunately, one or other of the parties has misconstrued them and must suffer accordingly. In our judgment it is the appellants who have misunderstood the position and the effect of the payment in, and this appeal must be dismissed.

Appeal dismissed with costs.

Solicitors: *Parker, Garrett & Co.; Stanley & Co. for C. W. Nelson & Co., Leeds.*

F. R. D.

C. A.

1960
May 2, 3,
4, 5;
June 2.

Hodson,
Pearce and
Upjohn L.JJ.

MIDLAND SILICONES LTD. *v.* SCRUTTONS LTD.

[1958 M. No. 920.]

Shipping—Bill of lading—Discharge—Hague Rules—Limitation of liability—Stevedores engaged by carrier—Action against stevedores for admitted negligence—Whether entitled to protection of limitation—" Carrier "—Carriage of Goods by Sea Act of United States, 1936, *ss.* 1 (*a*), 4 (5)—*Carriage of Goods by Sea Act,* 1924 (14 *&* 15 *Geo.* 5, *c.* 22), *Sch., Art. IV, r.* 5.

Contract—Implied term—Benefit to third party.

Contract—Parties—Enforcement by third party.

Bailment—Bald or sub-bailment—Stevedores—Possession in goods vested in stevedores by carrier for purpose of unloading—Whether stevedores entitled to benefit of contract between carrier and consignee.

Judicial Precedent—United States decision—Commercial law—Desirability of uniformity—U.S. Supreme Court.

Judicial Precedent—Australian decision—Commercial law—Desirability of uniformity—High Court of Australia.

By a bill of lading, which incorporated the United States Carriage of Goods by Sea Act, 1936, and limited to $500 (£179) per package the liability of the carrier in the event of loss, damage or delay, a drum containing chemicals was shipped from America to London. The defendants, who were stevedores engaged by the carrier, while lowering the drum from an upper floor of a dock transit shed on to a lorry, negligently dropped and damaged the drum when delivering it to the consignees in accordance with the bill of lading, causing part (worth £593) of its contents to be lost.

The consignees sued the stevedores in tort claiming £593. The stevedores, relying on the bill of lading, claimed that their liability was limited to $500:—

Held, (1) that the expression " carrier " in the bill of lading and the Act did not include stevedores (post, pp. 119, 130, 131, 135); that the bill of lading did not purport to provide any limitation of liability for the stevedores (post, p. 131), and that it was not entered into by the carrier as agents for the stevedores (post, pp. 122, 131, 135).

(2) That there was no general principle of law that where a contract contained an exemption clause the servants or agents who acted under that contract had the benefit of it (post, pp. 119, 124, 129, 134, 135).

(3) That the stevedores were not bailees of the drum (post, p. 131), or, if they were, they were not so by implication on the terms of the bill of lading (post, pp. 122, 124, 129, 131, 135).

(4) That accordingly the general principle applied that the defendants could not limit their liability to the plaintiffs in tort by relying on a contract between the plaintiffs and a third party to which they themselves were not parties (post, pp. 127, 134).

Per Pearce L.J. It is desirable that great common law jurisdictions should not lightly differ, more particularly on so universal a matter as commercial law (post, p. 128).

Dunlop Pneumatic Tyre Co. Ltd. v. *Selfridge & Co. Ltd.* [1915] A.C. 847, 853; 31 T.L.R. 399, H.L. *Adler* v. *Dickson* [1955] 1 Q.B. 158; [1954] 3 W.L.R. 696; [1954] 3 All E.R. 397, C.A.; *Krawill Machinery Corporation* v. *Robert C. Herd & Co. Inc.* [1959] 1 Lloyd's Rep. 305, and *Wilson* v. *Darling Island Stevedoring Co.* [1956] 1 Lloyd's Rep. 346, D.C. applied.

Dictum of Scrutton L.J. in *Mersey Shipping and Transport Co. Ltd.* v. *Rea Ltd.* (1925) 21 Ll.L.Rep. 375, 378 doubted.

Elder Dempster & Co. Ltd. v. *Paterson, Zochonis & Co. Ltd.* [1924] A.C. 522; 40 T.L.R. 464, H.L. considered.

Decision of Diplock J. [1959] 2 Q.B. 171; [1959] 2 W.L.R. 761; [1959] 2 All E.R. 289 affirmed.

APPEAL from Diplock J.[1]

The defendants, Scruttons Ltd., a firm of stevedores, appealed from a judgment of Diplock J. in favour of the plaintiffs, Midland Silicones Ltd., consignees under a bill of lading, for £593 12s. 2d. with interest thereon, by reason of the defendants' negligence. The defendants admitted their negligence but contended that their liability was limited to $500 (£179) under the bill of lading which it was common ground at the trial was still in force, but to which the defendants were not a party.

The following facts were agreed:

On or about March 26, 1957, a drum containing chemicals was shipped in New York by Dow Corning Corporation to London on the S.S. *American Reporter* consigned to the order of the plaintiffs, Midland Silicones Ltd., upon the terms of a bill of lading dated March 26, 1957, which incorporated the terms of the carrier's regular long form bill of lading. Clause 1 of the short form provided that its terms and those of the long form "shall govern the relations, whatsoever they may be, between "shipper, consignee and the carrier, master and ship in every "contingency, wheresoever and whensoever occurring and "whether the carrier be acting as such, or as bailee, and also "in the event of, or during deviation or of conversion of the "goods . . ." Clause 3 of the short form (and clause 1 of the long form) provided that: "This bill of lading shall have effect "subject to the provisions of the Carriage of Goods by Sea Act "of the United States, approved April 16, 1936, which shall be "deemed to be incorporated herein . . . The provisions stated

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[1] [1959] 2 Q.B. 171; [1959] 2 W.L.R. 761; [1959] 2 All E.R. 289.

"in said Act . . . shall govern before the goods are loaded on and "after they are discharged from the ship and throughout the "entire time the goods are in the custody of the carrier." Clause 3 of the long form provided that: "In this bill of lading ". . . the word 'carrier' shall . . . include the ship . . . her "owner, operator and demise charterer, and also any time "charterer or person, to the extent bound by this bill of lading, "whether acting as carrier or bailee." Condition 24 of the long form provided that: "In the event of any loss, damage or delay "to or in connection with goods exceeding in actual value 500 "dollars per package lawful money of the United States, or in "case of goods not shipped in packages, per customary freight "unit, the value of the goods shall be deemed to be 500 dollars "per package or per customary freight unit, as the case may be, "and the carrier's liability, if any, shall be determined on the "basis of a value of 500 dollars per package or per customary "freight unit, unless the nature and a higher value shall be "declared by the shipper in writing before shipment and inserted "in this bill of lading. It is agreed that the meaning of the "word 'package' includes animals, pieces and all articles of any "description except goods shipped in bulk."

Condition 4 of the long form provided that: "If the ship is "not owned by or chartered by demise to the United States "Lines Company, this bill of lading shall, with respect to the "carriage, custody and care of the goods while aboard the ship "or on her tackles, have effect only as a contract between the "shipper, consignee and the owner of the ship or demise "charterer, as the case may be, as principal made through the "agency of said company which shall be under no liability "whatsoever for loss of or damage to the goods or with respect "to such carriage, custody and care of the goods. If it shall be "adjudged that the United States Lines Company or any person "other than the owner or demise charterer is the carrier or bailee "of the goods, all rights, exemptions, immunities and limitations "of liability provided by law and all terms of this bill of lading "shall be available to it or such other person." Condition 17 provided (inter alia): " . . . and the carrier and master have the "right to appoint stevedores, master-porters and other agents " . . ."

Section 1 (*a*) of the United States Carriage of Goods by Sea Act, 1936, provides that: "The term 'carrier' includes the "owner or the charterer who enters into a contract of carriage "with a shipper." Section 4 (5) provides that: "Neither the "carrier nor the ship shall in any event be or become liable for "any loss or damage to or in connection with the transportation "of goods in an amount exceeding 500 dollars per package "lawful money of the United States . . . unless the nature and "value of such goods have been declared by the shipper before "shipment and inserted in the bill of lading."

The owners of the vessel and the carriers of the drum were United States Lines. At all material times the defendants, Scruttons Ltd., acted as stevedores and agents on behalf of United States Lines in London upon the terms of a stevedoring contract dated August 11, 1952, which provided that: "The "stevedores are to be fully responsible for any damage to vessel "or other property and any damage to or loss of cargo while "being handled or stowed, unshipped or delivered, or while in "stowage, if any damage caused by any negligence of themselves "or their servants. The stevedores to have such protection as "is afforded by the terms, conditions and exceptions of the bills "of lading Westbound and Eastbound." The plaintiffs were not at any material time personally aware of the existence or terms of the stevedoring contract.

No declaration as to the value of the drum was at any time made or inserted in the bill of lading pursuant to section 4 (5) of the United States Carriage of Goods by Sea Act, 1936, or condition 24 of the long form bill of lading.

On April 12, 1957, Neale & Wilkinson & Co. Ltd., the plaintiffs' London forwarding agents, presented the bill of lading of March 26 to the London office of United States Lines, who stamped it with a release stamp asking the defendants, "subject "to safe arrival," to release the goods.

On or about April 14, 1957, the vessel commenced to discharge her cargo at the dock berth alongside D Transit Shed, Royal Victoria Dock. At all material times United States Lines paid an annual rental to the Port of London Authority for the use of the quay and transit sheds at this berth upon the terms of an agreement dated May 7, 1935. On or about April 15, 1957, servants of the defendants discharged the drum from the vessel and transferred it to a place on the upper floor of D shed. On May 1, 1957, H.M. Customs cleared the drum.

On May 3, 1957, the Port of London Authority received a delivery note from Neale & Wilkinson & Co. Ltd., requesting delivery of the drum to Tingle Jacobs & Co., cartage contractors. On the same day the P. L. A., in accordance with normal practice, issued a landing order, addressed to the defendants, to the driver of Tingle Jacobs' lorry; and the driver delivered the landing order to a servant of the defendants who worked in the dock office of United States Lines. Servants of the defendants removed the drum to an opening on the top floor of D shed and prepared to sling the drum down on to the lorry. While the drum was being lowered on to the lorry it was dropped and damaged owing to the negligence of the defendants' servants and some of its contents were lost. The value of the lost contents and the loss sustained by the plaintiffs was £593 12s. 2d.

The claim for that sum having been allowed by Diplock J., the defendants appealed.

Eustace Roskill Q.C. and *S. O. Olson* for the defendants (the appellants). The question is whether the defendants as the shipowners' agents are entitled to the benefit of the limitation to $500 contained in the bill of lading, which it is common ground, was in full force when the drum was dropped by the admitted negligence of the defendants. It is submitted that the principle of *Elder Dempster & Co. Ltd.* v. *Paterson, Zochonis & Co. Ltd.*[2] applies in support of the claim to limit their liability to $500. That was the view taken of *Elder Dempster*[2] by Scrutton L.J. in *Mersey Shipping & Transport Co. Ltd.* v. *Rea Ltd.*,[3] which, it is submitted, was correct.

This is an American bill of lading and it is the American practice for the shipowner to accept the limitation of the Hague Rules. Denning L.J. in *Adler* v. *Dickson*[4] considered that the Hague Rules did apply to protect stevedores in that they had a sufficient interest in the contract to entitle them to enforce it: see also *Smith & Snipes Hall Farm* v. *River Douglas Catchment Board.*[5] *Adler* v. *Dickson*[6] was concerned with personal injury; there was no bailment. There is now some difficulty with the argument based on *Snipes Hall*[5] in this court, because of the subsequent decision of the Court of Appeal, in *Green* v. *Russell, McCarthy (Third Party)*,[7] where it was held that a person cannot enforce a contract to which he was not a party. The defendants cannot now argue this point in the Court of Appeal, although they can do so in the House of Lords. That, however, is not quite the same thing as saying that the defendants cannot rely on a provision which is intended as a benefit—it can be shield if not a sword.

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[2] [1924] A.C. 522; 40 T.L.R. 464, H.L.

[3] (1925) 21 Ll.L.Rep. 375.

[4] [1955] 1 Q.B. 158; [1954] 3 W.L.R. 696; [1954] 3 All E.R. 397, C.A.

[5] [1949] 2 K.B. 500; 65 T.L.R. 628; [1949] 2 All E.R. 179, C.A.

[6] [1955] 1 Q.B. 158.

[7] [1959] 2 Q.B. 226; [1959] 3 W.L.R. 17; [1959] 2 All E.R. 525, C.A.

The defendants submit: (1) At all material times the United States Lines were bailees of the drum from the plaintiffs as bailors. (2) The terms of bailment are contained in or evidenced by the bill of lading, the contract between the plaintiffs and the United States Lines. (3) That contract was enforceable at all material times. (4) That contract provided for vicarious performance. (5) The defendants were agents of United States Lines to perform a part of its obligations to the plaintiffs, namely, the obligation to discharge those goods or that drum from the ship, put it in the shed and physically deliver it to London to the plaintiffs or as they might direct. (6) The defendants were at the time they dropped the drum the sub-bailees of the goods. (7) In their capacity as agents or sub-bailees in the course of their employment, the defendants negligently dropped the drum. (8) The United States Lines were by common consent entitled to limit their liability to $500, and had they been sued on the contract that was the limit which the plaintiffs could have recovered against them. (9) The defendants as sub-bailees or agents are entitled to the same right of limitation as the United States Lines, because the act complained of was done in the course of delivering the goods under the bill of lading, which provided that United States Lines were not to be liable for more than $500 worth of damage.

This was not an independent tort unconnected with the performance of any contract. It was an act done in the course of rendering the United States Lines services provided for in the bill of lading and the limitation of liability therein contained must attach whatever the form of action and whether the shipowners or stevedores be sued. That proposition, with slight alterations, is taken from the speech of Lord Finlay in the *Elder Dempster* case.[8]

Diplock J. analysed *Elder Dempster*[8] by the counting of judicial heads and decided that the majority of the House of Lords did not decide the case on the theory of vicarious immunity, and he has wrongly excluded the ratio of Lord Finlay who did in fact adopt the theory of vicarious immunity. If the method of counting heads is adopted there is a majority in support of the defendants' contention, taking Lord Findlay, Lord Cave and Lord Carson. In the Court of Appeal Scrutton L.J. delivered a strong dissenting judgment, but there is no serious difference between him and the majority of the House of Lords on this point. If that be right, that would give the support of four judges in favour of the defendants' contention for what has been shortly called the "umbrella principle."

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[8] [1924] A.C. 522, 548.

Alternatively, if *Elder Dempster* [9] does not apply: (a) the bill of lading and/or the Hague Rules on their true construction cover stevedores, in that the expression "carrier" includes stevedores; (b) there was a contract, express or implied between the defendants and the plaintiffs, made through the agency of the United States Lines.

The judge has rested his judgment on this: the defendants were not a party to any contract protecting them, therefore they are not protected. But where there is a protective condition in a contract to protect a third party, that person, when sued in respect of something which arises out of the performance of the contract, can rely on it. If that were wrong, one could always circumvent the Hague Rules.

[UPJOHN L.J. You have been arguing the case on the footing that the defendants were bailees, were they?]

It does not matter whether they were or not, it is sufficient for their case based on *Elder Dempster* [10] that they were agents; but it is needed for the argument based on the bill of lading or section 4 (5) of the United States Carriage of Goods by Sea Act, 1936.

In *Adler* v. *Dickson* [11] Denning L.J. treated the Scrutton principle as established law, although Jenkins and Morris L.JJ. did not. The argument based on *Elder Dempster* [12] on behalf of the defendants in that case is adopted; Jenkins L.J. said that it went too far, but he did not say that it was wrong; he refused to extract from *Elder Dempster* [12] any overriding principle of vicarious immunity, but there is no judgment actually against the defendants' contention. So far as there are any dicta in *Adler* v. *Dickson* [13] against it, they are based on a misunderstanding of *Elder Dempster*.[14] Moreover, *Adler* v.

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[9] [1924] A.C. 522.
[10] [1924] A.C. 522.
[11] [1955] 1 Q.B. 158.
[12] [1925] A.C. 522.
[13] [1955] 1 Q.B. 158.
[14] [1924] A.C. 522.

Dickson[15] was not dealing with carriage of goods, but with vicarious liability for personal injury. Diplock J. said that the facts were far removed from the present case, but the principle was not. [*Mersey* v. *Rea*[16] and *Cosgrove* v. *Horsfall*[17] were also referred to.]

Where there is a contract of carriage of goods by sea and the person carrying agrees with the owner of the goods to certain limiting terms, those provisions protect everybody participating in the contract, because of the application of the Hague Rules and what was said in *Elder Dempster*.[18] It is said that such an argument amounts to this: that the House of Lords decided *Elder Dempster*[19] in a way inconsistent with *Dunlop Pneumatic Tyre Co. Ltd.* v. *Selfridge & Co. Ltd.*[20] There is nothing in the opinions to suggest that; there is no *Dunlop* v. *Selfridge*[20] point here.

[HODSON L.J. Do you limit this as a special rule applying only to carriage of goods or does it apply to contracts generally?]

It is a special and a very sensible rule applying to carriage of goods by land or sea; if it were otherwise it would drive a coach and horses through the Hague Rules: see the judgment of Devlin J. on the construction of the Hague Rules in *Pyrene Co. Ltd.* v. *Scindia Navigation Co. Ltd.*,[21] and *The Kirknes*.[22] Having regard to the context of "carrier" in the Hague Rules, "carrier" can be defined as embracing everyone who is concerned in the operation of carrying: see definition of "carrier" in Scrutton on Charterparties, 16th ed., p. 466, although that definition is not exhaustive.

This question also arose in a number of Australian and American cases. As to the Australian cases, Scrutton L.J.'s statement in *Mersey* v. *Rea* was adopted in *Gilbert Stokes and Kerr Proprietary Ltd.* v. *Dalgety & Co. Ltd.*[23] and *Waters Trading Co. Ltd.* v. *Dalgety & Co. Ltd.*,[24] but in *Wilson* v. *Darling Island Stevedoring and Lighterage Co. Ltd.*,[25] Fullagar J. rejected it. In the most recent decision, *Krawill Machinery Corporation* v. *Robert C. Herd & Co. Inc.*,[26] the court similarly refused to uphold the Scrutton principle, although the judgment there can be given an interpretation wide enough to cover the defendants' contention in the present case. In any event, those decisions do not bind this court.

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[15] [1955] 1 Q.B. 158.

[16] 21 Ll.L.Rep. 375.

[17] (1945) 62 T.L.R. 140, C.A.

[18] [1924] A.C. 522.

[19] Ibid.

[20] [1915] A.C. 837; 31 T.L.R. 399, H.L.

[21] [1954] 2 Q.B. 402; [1954] 2 W.L.R. 1005; [1954] 2 All E.R. 158.

[22] [1957] P. 51; [1957] 2 W.L.R. 20; [1957] 1 All E.R. 97.

[23] (1948) 81 Ll.L.Rep 337.

[24] [1951] 2 Lloyd's Rep. 385.

[25] [1956] 1 Lloyd's Rep. 346.

[26] [1959] 1 Lloyd's Rep. 305.

The point as to consideration must also be met. It is argued that as the defendants have furnished no consideration (and Diplock J. so held) they cannot rely on the $500 limitation. See Scrutton, pp. 286-287; Salmond on Torts, 10th ed., p. 9, 11th ed. pp. 10-11, although this passage does not appear in the twelfth edition. The finding on the question of consideration is wrong in principle and authority: in principle because each person doing an act in performance of the contract is himself suffering a liability or detriment, and it is trite law that consideration need not be a benefit, it can be a detriment. The consideration here is the acceptance by the defendants of responsibility by exposing themselves to the risk of being sued for every act done by them in relation to the performance of this contract: see Anson on Contracts, 21st ed., pp. 77 and 86; 18th ed., p. 94; *Shadwell* v. *Shadwell*[27]; *Scotson* v. *Peg.*[28]

Alan Mocatta Q.C. and *Michael Kerr* for the plaintiffs (the respondents). This is a test case of the greatest importance; it can only be decided by steadfast adherence to some legal principle if the law is not to be brought into confusion. The starting point is the simple admitted fact that the plaintiffs' goods were damaged by the negligence of the defendants' servants, and unless they can establish that there is a binding contract, express or implied, between them and the plaintiffs limiting liability, they are liable for the whole amount.

The cardinal principles of law applicable are that subject to certain very limited exceptions, more apparent than real, one who is not a party to a contract cannot sue on it or rely on the benefit of it. Further, where someone is relying on the benefit of it, there must be consideration. The exceptions are: (1) Contracts made by an agent for an undisclosed principal; (2) Trusts; (3) Covenants running with the land; (4) Cases within section 56 of the Law of Property Act, 1925; (5) Restrictions on the price of goods under section 25 of the Restrictive Trade Practices Act, 1956.

It was argued below that *Elder Dempster*[29] (according to the principle advanced by Denning L.J. in *Adler* v. *Dickson*[30]) was also an exception. The position has altered since that argument because of the decision in *Green* v. *Russell*,[31] and it is now argued that the Denning principle can only be used as a shield and not as a sword; and although the defendants do not contend for the full "umbrella principle," they do contend that all who are concerned in the performance of a contract of carriage of goods are protected by its limiting provisions. They argue that that is the effect of *Elder Dempster*.[32] It is quite uncertain on what principle of law that case was decided; nobody really knows what it has decided. Scrutton L.J. gave it a particular interpretation that has been rejected by this court in *Adler* v. *Dickson*,[33] and this appeal cannot be allowed without contravening the decision of the Court of Appeal in that case.

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[27] (1860) 9 C.B.N.S. 159.

[28] (1861) 6 H. & N. 295.

[29] [1924] A.C. 522.

[30] [1955] 1 Q.B. 158.

To succeed, the defendants must surmount a number of leading cases. The first is *Dunlop* v. *Selfridge*,[34] which is authority for the proposition that (apart from the question of consideration) a person must show that he was a party to a contract before he can claim the benefit of it. The second is *Cosgrove* v. *Horsfall*,[35] although the *Elder Dempster*[36] case was not cited in that case; but in *Adler* v. *Dickson*[37] there was the fullest possible debate on *Elder Dempster*,[38] and the Court of Appeal applied the principle of *Dunlop* v. *Selfridge*,[39] although they do not refer to it.

A number of details must be referred to before consideration of *Elder Dempster*.[40] One must look at the terms of the short and of the long bill of lading: there is no provision expressly purporting to cover stevedores. There is no evidence of any contract between the plaintiffs and the defendants made through the United States Lines. The defendants were not bailees or sub-bailees of this particular drum; and that is important when considering *Elder Dempster*[40]; that case was based on bailment; see *Wilson* v. *Darling*,[41] *per* Williams J.

As to the Hague Rules, it is necessary to be precise as to what is meant thereby; they may have to be applied by an English court as part of a statute or as part of a contract, i.e., in English law they only apply to an outward bill of lading. Here they are incorporated in the contract as part of the American law; one knows the opinion of the American court on that question—that "carrier" does not include stevedore: *Krawill Machinery.*[42] It is clear that the framers of the rules never intended to cover all persons engaged in carrying out a contract.

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[31] [1959] 2 Q.B. 226.
[32] [1924] A.C. 522.
[33] [1955] 1 Q.B. 158.
[34] [1915] A.C. 847.
[35] 62 T.L.R. 140.
[36] [1924] A.C. 522.
[37] [1955] 1 Q.B. 158.
[38] [1924] A.C. 522.
[39] [1915] A.C. 847.
[40] [1924] A.C. 522.
[41] [1956] 1 Lloyd's Rep. 346, 353.

To establish a contract between two people which includes a third, one must show either express words or that one person contracted as another's agent and had the authority of that other person. Not only are there no words to include a third party, but words are used which would exclude them, because the contract says expressly who is to be included. There is no other evidence which would show that United States Lines made a contract on behalf of the defendants. The latter were acting as servants of United States Lines, and did not receive possession of the goods from United States Lines but were merely manipulating the goods for them. The mere physical handling of goods does not amount to possession: Archbold's Criminal Pleading, Evidence of Practice, 33rd ed., p. 785.

[Upjohn L.J. I should have thought that possession went straight from United States Lines to Tingle Jacobs.]

That is exactly my submission.

There are several explanations why *Elder Dempster*[43] does not apply: (1) That case decided no principle but was peculiar to its own facts, that was the view of Jenkins L.J. in *Adler* v. *Dickson.*[44] (2) It was a case of bailment or implied contract: *Adler* v. *Dickson*,[44] *per* Morris L.J. (3) The argument on the "umbrella principle" is restricted in this court to agents engaged in the carriage of goods by land or sea. (4) In *Elder Dempster*,[45] unlike *Mersey* v. *Rea*,[46] there was possession by the shipowner. (5) In *Elder Dempster*[47] the shipowners were specifically referred to in the bill of lading; and it is submitted that Lord Finlay and Lord Cave would have expressed their opinions differently if the bills of lading had not been in the form they were. The main point in that case was whether there was bad stowage which was covered by the exceptions clause and had nothing to do with this case. [Reference was made to *Elder Dempster*[48] in the Court of Appeal and before Rowlatt J.[49]]

In the House of Lords Lord Finlay was dissenting, and therefore his judgment was obiter; Lord Sumner did not adopt the "umbrella principle," and Lord Dunedin agreed with him. On the question of vicarious liability there is only Lord Cave, with whom Lord Carson agreed, but it is submitted that if the test had been whether everybody in the House agreed with Lord Finlay the appeals would have been dismissed.

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[42] [1959] 1 Lloyd's Rep. 305.

[43] [1924] A.C. 522.

[44] [1955] 1 Q.B. 158.

[45] [1924] A.C. 522.

[46] 21 Ll.L.Rep. 375.

[47] [1924] A.C. 522.

[48] [1923] 1 K.B. 420, C.A.

[49] (1922) 12 Ll.L.Rep. 69.

None of the Lords in *Elder Dempster*[50] used language to show that they were laying down any new principle; they were not approving the umbrella principle in its widest terms and they were not overruling the fundamental principles of law in *Dunlop* v. *Selfridge*.[51]. It is significant that its alleged principle is ignored in the leading textbooks; if it laid down any principle it would be a case of great importance. [*Hall* v. *Brooklands Auto-Racing Club*[52] and *Wilson* v. *Darling*[53] were also referred to.] The *Pyrene* case[54] was not one in which the umbrella principle was upheld, but of the contractual relationship between buyers and shipowners.

The court is bound by the decision in *Adler* v. *Dickson*[55] as to the meaning of *Elder Dempster*[56]; the judgments of Jenkins and Morris L.JJ. show that in their opinion *Elder Dempster*[56] was not laying down any new principle. Jenkins L.J. also said that he preferred the view of Bankes L.J. in *Mersey* v. *Rea*[57] to that of Scrutton L.J. as the interpretation of *Elder Dempster*.[58]

On the question of precedent, the fact that the Court of Appeal has misunderstood a decision of the House of Lords does not mean that a later Court of Appeal can refuse to follow it: *Williams* v. *Glasbrook*.[59] See also Salmond on Torts, pp. 10–11; that passage is cited as part of this argument, although it is not authoritative.

The present tendency is against allowing people to escape from their liability for a fundamental breach of contract, and it would be surprising if *Elder Dempster*[60] were to be allowed to help the defendants to do so. The American case of *Krawill Machinery*[61] does not take the view of *Elder Dempster*[62] for which the defendants contend. Their legal system has a common origin with that of this country, and it is desirable that there should be uniformity on the law in this country and America and throughout the Commonwealth. At the moment there is

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[50] [1924] A.C. 522.
[51] [1915] A.C. 847.
[52] [1933] 1 K.B. 205; 48 T.L.R. 546, C.A.
[53] [1956] 1 Lloyd's Rep. 346.
[54] [1954] 2 Q.B. 402.
[55] [1955] 1 Q.B. 158.
[56] [1924] A.C. 522.
[57] 21 Ll.L.Rep. 375.
[58] [1924] A.C. 522.
[59] [1947] 2 All E.R. 884, C.A.
[60] [1924] A.C. 522.
[61] [1959] 1 Lloyd's Rep. 305.
[62] [1924] A.C. 522.

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uniformity in America and Australia, and there will also be in this country if this appeal is dismissed.

[He was stopped on the question of consideration.]

Roskill Q.C. replied. One thing that is clear about *Adler* v. *Dickson*[63] is that it did not decide the point raised in the present case; the difference is that in the contract for the carriage of goods there is the concept of goods passing from the possession of one hand to another in the course of the performance of a single contract. No one can say that in the carriage of persons there is any question of possession. All that *Adler* v. *Dickson*[63] decided was that one cannot extract the full *Mersey* v. *Rea*[64] principle from *Elder Dempster*[65] in respect of the carriage of passengers, but it did not decide that the principle cannot be extracted from *Elder Dempster*[65] in respect of carriage of goods. There is here the necessary performance by agents coupled with possession to bring in the principle of *Elder Dempster*.[66]

The *Pyrene* case[67] is really a perfect illustration of the "umbrella principle"; it is based on the view of Devlin J. of *Elder Dempster*[68] as it relates to carriage of goods; it never occurred to him that, if stevedores had been involved in that case, they would not have been protected.

As to *Wilson* v. *Darling*,[69] the plaintiffs ignored two points —the master signed on behalf of the owners and there was no bailment.

The question of consideration was only raised because Diplock J. found that there was no consideration and, if the judgment is to be reversed, it is necessary to go to the root and branch of it.

[Scrutton on Charterparties, pp. 62, 475, 476, was also referred to.] *Hiram Walker & Sons Ltd.* v. *Dover Navigation Co. Ltd.*[70] is cited merely to show how often the *Elder Dempster*[71] position arises.

Cur. adv. vult.

June 2. Their Lordships read the following judgments.

Hodson L.J., having stated the facts, continued: I have said that the defendants were not parties to the bill of lading. They were not anywhere mentioned in it, either directly or indirectly.

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[63] [1955] 1 Q.B. 158.
[64] 21 Ll.L.Rep. 375.
[65] [1924] A.C. 522.
[66] Ibid.
[67] [1954] 2 Q.B. 402.
[68] [1924] A.C. 522.
[69] [1956] 1 Lloyd's Rep. 346.
[70] (1949) 83 Ll.L.Rep. 84.
[71] [1924] A.C. 522.

The bill of lading is in short form, but incorporates the United States Lines' long form bill of lading. Clause 1 of the short form provides that its terms, and those of the long form, "shall "govern the relations, whatsoever they may be, between shipper, "consignee and the carrier, master and ship in every contingency "wheresoever and whensoever occurring." I see no justification for holding that the word "carrier" includes stevedore. Stevedores are referred to in clause 17 of the long bill of lading, which mentions the right of the carrier and master to appoint stevedores, which does not suggest that the word "carrier" can include stevedore.

The defendants further rely on the conditions in this clause, and say that as sub-bailees of the goods of the plaintiffs from the United States Lines they come under the heading of bailees in the bill of lading. On the question of bailment it is, I think, sufficient to say that on the facts there was no such exclusive possession on the part of the defendants as would support a bailment.

It is further contended that under the United States Carriage of Goods by Sea Act, 1936, incorporated in the bill of lading by clause 3 of the short form and clause 1 of the long form, the defendants are protected, if not expressly, by implication. [His Lordship read section 4 (5) of the Act of 1936.] It is true that the definition of "carrier" in the Act is not exhaustive, but it is sufficient to say that the phrase "carrier or his agent," or like expressions, appears throughout the Act, and does not support the view that "carrier" includes stevedore, but rather points to the contrary. Stevedores do not make a contract of carriage, although they may agree to put things on board ship. I agree with the construction of the United States Act adopted by Diplock J.

This construction of the Act has been adopted by the United States Supreme Court in *Krawill Machinery Corporation* v. *Robert C. Herd & Co. Inc.*,[1] where the same contention was made and rejected as in this case, namely, that the liability limiting provisions of the Carriage of Goods by Sea Act, 1936, and the bill of lading, should be construed as limiting the liability of the stevedores as well as that of the carrier.

There remains to be considered the argument which has had in the past some support from authorities in this country, in the Commonwealth of Australia and the United States of America. This argument is as follows: Having regard to the nature of this contract, the tort of negligence having been committed in the course of delivery of goods under a bill of lading was not an independent tort unconnected with the performance of any contract, so that the act being done in the course of rendering the very service provided for in the bill of lading, the limitation on liability must attach whatever the form of action, and whether the ship or the stevedore be sued. So far as the courts of this country are concerned, the argument stems from a dictum of Scrutton L.J. in *Mersey Shipping and Transport Co. Ltd.* v. *Rea Ltd.*,[2] where, differing from Bankes L.J., the other member of the Divisional Court which was sitting on an appeal from the Liverpool County Court, he said[3]: "I think that the reasoning "of the House of Lords in the *Elder Dempster* case[4] shows that, "where there is a contract which contains an exemption clause, "the servants or agents who act under that contract have the "benefit of the exemption clause. They cannot be sued in tort "as independent people, but they can claim the protection of the "contract made with their employers on whose behalf they are "acting. I think this is the result of the second point in the "judgments of Lord Cave and Lord Sumner with whom Lord "Dunedin concurs in the *Elder Dempster* case.[4]"

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[1] [1959] 1 Lloyd's Rep. 305.

In view of what Scrutton L.J. said it would be an impertinence for me to say that grounds for his observations are not to be discerned in the speeches in the House of Lords in the case to which he is referring, namely, *Elder Dempster Co.* v. *Paterson, Zochonis & Co. Ltd.*,[5] not only in the speeches to which he referred, but also in the speech of Lord Finlay, who dissented on the result of the appeal, so that his observations may be treated as obiter. Moreover, in the *Elder Dempster* case,[5] sitting in the Court of Appeal, Scrutton L.J. had said in his judgment[6]: "The real answer to "the claim is in my view that the shipowner is not in possession "as a bailee, but as the agent of a person, the charterer, with "whom the owner of the goods has made a contract defining his "liability, and that the owner as servant or agent of the "charterer can claim the same protection as the charterer. Were "it otherwise there would be an easy way round the bill of lading "in the case of every chartered ship; the owner of the goods "would simply sue the owner of the ship and ignore the bill of "lading exceptions, though he had contracted with the charterer

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[2] (1925) 21 Ll.L.Rep. 375, D.C.

[3] Ibid. 378.

[4] [1924] A.C. 522; 40 T.L.R. 464, H.L.

[5] [1923] 1 K.B. 420, C.A.

[6] Ibid. 441.

" for carriage on those terms and the owner had only received the " goods as agent for the charterer." In none of the speeches in the House of Lords was this passage in the judgment of Scrutton L.J. subject to criticism.

The statement of the law as set out in *Mersey Shipping and Transport Co. Ltd.* v. *Rea Ltd.*[7] was adopted in Australia in *Gilbert Stokes and Kerr Proprietary Ltd.* v. *Dalgety & Co. Ltd.*[8] and *Waters Trading Co. Ltd.* v. *Dalgety & Co. Ltd.*,[9] where the Supreme Court of New South Wales held that stevedores who negligently performed part of the work undertaken by the carrier were entitled to the limiting provisions of the bill of lading though the stevedores were neither parties to nor express beneficiaries of the bill of lading.

However, in *Wilson* v. *Darling Island Stevedoring and Lighterage Co. Ltd.*[10] an appeal involving facts indistinguishable from those involved in the two New South Wales cases, the High Court of Australia overruled both cases. I quote the passage from the opinion of Fullagar J. cited by the United States Supreme Court in the *Krawill* case[11]: " The stevedore is a complete " stranger to the contract of carriage, and it is no concern of his " whether there is a bill of lading or not, or, if there is, what are " its terms. He is engaged by the shipowner and by nobody else, " and the terms on which he handles the goods are to be found " in his contract with the shipowner and nowhere else. The " shipowner has no authority whatever to bind the shipper or " consignee of cargo by contract with the stevedore, and there is, " in my opinion no principle of law—deducible from the *Elder* " *Dempster* case,[12] or from any other case—which compels the " inference of any contract between the shipper or consignee and " the stevedore. If the stevedore negligently soaks cargo with " water and ruins it, I can find neither rule of law nor contract " to save him from the normal consequences of his tort."

The view expressed by Scrutton L.J. had been adopted in various decisions in the United States of America, all of which must now be taken to have been overruled by the decision of the Supreme Court in the *Krawill* case,[13] which expressly rejected this view, and found no foundation for it in the opinions given by the members of the House of Lords in the *Elder Dempster* case.[14]

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[7] 21 Ll.L.Rep. 375.

[8] (1948) 81 Ll.L.Rep. 337.

[9] [1951] 2 Lloyd's Rep. 385.

[10] [1956] 1 Lloyd's Rep. 346.

[11] [1959] 1 Lloyd's Rep. 305, 310.

[12] [1924] A.C. 522.

[13] [1959] 1 Lloyd's Rep. 305.

[14] [1924] A.C. 522.

In this country the view of the *Elder Dempster* case [14] entertained by Scrutton L.J. has been recognised as authoritative, if not directly applied, having regard to the overseas expressions of opinion by the common law courts of the United States and Australia: cf. *Pyrene Co. Ltd.* v. *Scindia Navigation Co. Ltd.*,[15] where Devlin J., although not basing his judgment on what I may call the Scrutton principle, recognised it as, in his opinion, authoritative. This court is not absolved by the United States and Australian decisions from giving its decision upon the question, since the case has been presented to this court on the footing that we are bound by the *Elder Dempster* case [16] itself to reach the conclusion at which Scrutton L.J. himself arrived.

Before referring to that case, I must first state the elementary principle of English law which is to be found in a decision of the House of Lords itself in *Dunlop Pneumatic Tyre Co. Ltd.* v. *Selfridge & Co. Ltd.*[17] which is clear authority for the general proposition that the defendants cannot limit their liability to the plaintiffs in tort by relying upon a contract between the plaintiff and a third party to which they themselves were not parties. To this rule there is an apparent exception where one party to a contract is shown by admissible evidence to have contracted as agent for an undisclosed principal. Upon this part of the case I can find nothing in the evidence to justify the inference that the United States Lines were contracting as agents for the defendants, nor does the language of the bill of lading itself support such a conclusion. Other exceptions to the rule are not here relevant, such as exceptions dependent on trusts or covenants running with the land, and the exceptions contained in section 25 of the Restrictive Practices Act, 1956. Section 56 of the Law of Property Act, 1925, was relied upon in the pleadings, but not in this court. Is there a further exception to the rule in *Dunlop* v. *Selfridge?* [18]

It was argued in this court in *Adler* v. *Dickson* [19] that the true effect of the *Elder Dempster* case [20] as explained by Scrutton L.J. in *Mersey Shipping and Transport Co. Ltd.* v. *Rea Ltd.*[21] was that a master of a ship was protected against an action for tort brought against him by a passenger on his ship by reason of the

[14] [1924] A.C. 522.

[15] [1954] 2 Q.B. 402; [1954] 2 W.L.R. 1005; [1954] 2 All E.R. 158.

[16] [1924] A.C. 522.

[17] [1915] A.C. 847; 31 T.L.R. 399, H.L.

[18] [1915] A.C. 847.

[19] [1955] 1 Q.B. 158; [1954] 3 W.L.R. 696; [1954] 3 All E.R. 397, C.A.

[20] [1924] A.C. 522.

[21] 21 Ll.L.Rep. 375.

conditions on the sailing ticket issued by a shipping company which contained the following provision [22]: " Passengers . . . are " carried at passengers' entire risk," and " The company will not " be responsible for and shall be exempt from all liability in " respect of any . . . injury whatsoever of or to the person of any " passenger . . . whether the same shall arise from or be " occasioned by the negligence of the company's servants . . . in " the discharge of their duties, or whether by the negligence of " other persons directly or indirectly in the employment or service " of the company . . . under any circumstances whatsoever. . . ." This court, following its own decision in *Cosgrove* v. *Horsfall*,[23] which was, indeed, fatal to the defendant's contention, rejected the argument, but dealt with the matter fully since the defendants relied upon the *Elder Dempster* case [24] not having been cited to the court in *Cosgrove* v. *Horsfall* [25] so that it could be said that the latter case had been decided per incuriam.

In *Cosgrove* v. *Horsfall* [25] the London Transport Board had specifically provided that when not travelling on the board's business, neither the company nor their servants would be liable to the holder of a free pass, namely, the plaintiff. Nevertheless, the plaintiff was held to be entitled to recover damages for injuries received in an action against the negligent driver of the board's omnibus. In *Adler* v. *Dickson*,[26] on the preliminary question whether the defendants were entitled to the protection admittedly afforded to the company by the ticket, the point was decided against the defendants by Pilcher J., whose judgment was confirmed on appeal to this court. At first instance Pilcher J. had followed *Cosgrove* v. *Horsfall*,[27] holding that even if, as he assumed to be correct, the dictum of Scrutton L.J. in the *Mersey* case [28] applied to carriage of goods by sea, the same doctrine could not be applied so as to give vicarious immunity for a tort in an action for personal injuries.

In the Court of Appeal the argument based on the observations of Scrutton L.J. in the *Mersey* case [28] was fully considered, and no distinction in principle was drawn by the majority of the court; nor do I think it could be drawn between actions of the special character therein mentioned, and actions for personal injuries laid in tort where the tort is connected with the performance of a contract. The speeches in the *Elder Dempster* case [29] were studied by the members of the court as they have been by us in this case; and the conclusion reached by Jenkins L.J. was that he preferred the view expressed by Bankes L.J. in the *Mersey* case[30] to that expressed by Scrutton L.J. The former had said[31]: "But the court there held that under the circum-"stances of the vessel being chartered to form one of the owners' "regular line, the proper inference to draw was that the goods "were shipped under conditions which would cover both charterer "and shipowner." Morris L.J. in *Adler* v. *Dickson*[32] was of opinion that the House of Lords in the *Elder Dempster* case[33] did not direct any different conclusion from that which was reached in *Cosgrove* v. *Horsfall*.[34]

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[22] [1955] 1 Q.B. 158.

[23] (1945) 62 T.L.R. 140, C.A.

[24] [1924] A.C. 522.

[25] 62 T.L.R. 140.

[26] [1955] 1 Q.B. 158.

[27] 62 T.L.R. 140.

[28] 21 Ll.L.Rep. 375.

[29] [1924] A.C. 522.

On this view, the House of Lords in the *Elder Dempster* case[35] did not intend to introduce a further exception to the general rule that only parties to a contract can rely upon its terms; and the decision itself on this part of that case must be taken to have depended on the special circumstances there being considered. Notwithstanding the argument addressed to us on behalf of the defendants, I am not persuaded, even if I were entitled to distinguish *Adler* v. *Dickson*[36] (which I doubt), that any new principle—as was thought by Scrutton L.J.—was introduced into our law by the House of Lords in the *Elder Dempster* case.[37] In the circumstances, since these speeches have been so much discussed, not only in the Court of Appeal in *Adler* v. *Dickson*,[38] but also in the United States Supreme Court in the *Krawill* case,[39] and in the High Court of Australia in *Wilson* v. *Darling Island Stevedoring and Lighterage Co. Ltd.*,[40] I do not think it profitable to endeavour to add my own analysis of those speeches.

I would, accordingly, dismiss the appeal for the same reason as that stated by Diplock J., that is to say, upon the ground that the case is covered in principle by the decision of the House of Lords in *Dunlop* v. *Selfridge*.[41] I need only add that argument was not addressed to this court (as it was to Diplock J.) to the effect that a further principle was to be found to support the defendants' case in some observations made by Denning L.J. in *Smith and Snipes Hall Farm Ltd.* v. *River Douglas Catchment Board*,[42] and by Denning L.J. in other cases, including *Adler* v.

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[30] 21 Ll.L.Rep. 375.
[31] Ibid. 377.
[32] [1955] 1 Q.B. 158, 198, 199.
[33] [1924] A.C. 522.
[34] 62 T.L.R. 140.
[35] [1924] A.C. 522.
[36] [1955] 1 Q.B. 158.
[37] [1924] A.C. 522.
[38] [1955] 1 Q.B. 158.
[39] [1959] 1 Lloyd's Rep. 305.
[40] [1956] 1 Lloyd's Rep. 346.
[41] [1915] A.C. 847.
[42] [1949] 2 K.B. 500; 65 T.L.R. 628; [1949] 2 All E.R. 179, C.A.

Dickson[43] itself. This course was taken by counsel for the defendants in view of a decision of this court, reached after Diplock J. had given his decision in this case, in *Green* v. *Russell, McCarthy (Third Party)*.[44]

I would dismiss the appeal.

PEARCE L.J. The defendants are stevedores who negligently damaged the plaintiffs' goods while in transit under a bill of lading. Being sued, they claim to limit the plaintiffs' damages by relying on a limitation clause of the bill of lading in the carrier's favour. This limitation (founded on the Hague Rules) is also contained in the United States Carriage of Goods by Sea Act, 1936, which was incorporated in the bill of lading. The judge held that the stevedores were not parties to the bill of lading, and gave no consideration under it, and that they cannot claim the protection of its conditions.

It is for the defendants to establish their right to a limitation which will deprive the plaintiffs of their full measure of damages. Their main argument before us has been the argument (which the judge rejected) of "vicarious immunity," to use the convenient phrase of Holmes J. in *Collins & Co.* v. *Panama Railroad Co.*[45] That argument is as follows: The carriers were bailees of the plaintiffs' goods on the terms of the bill of lading which contemplated and provided for vicarious performance by the carriers of part or all of their obligations to the plaintiffs: see clauses 8 and 17. The defendants were the carrier's agents to perform part of such obligations, whether as bailees, sub-bailees, or otherwise. The defendants are therefore entitled, it is argued, to the same right of limitation as the carrier, for theirs was not an independent tort unconnected with the performance of the contract. It was a negligent act done in the course of rendering the very services provided for in the bill of lading, and the limitation on liability must apply to the resulting damage whatever the form of action, and whether the shipowner or the stevedore be sued.

This proposition plainly has much to commend it as a matter of convenience from the carrier's point of view, although the shipper might well hold strong views to the contrary. In cases of carriage of goods, one contract frequently covers a chain of

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[43] [1955] 1 Q.B. 158.

[44] [1959] 2 Q.B. 226; [1959] 3 W.L.R. 17; [1959] 2 All E.R. 525, C.A.

[45] (1952) 197 Fed. (2nd) 893.

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activities by various persons in connection with the carriage of the goods. If the contract contains a limitation of liability for negligence, and if that limitation can only be enforced by the initial link of the chain—namely, the immediate party to the contract—the goods owner (the defendants argue) can avoid the spirit at least of his bargain by an action in tort for unlimited damages against some other link in the chain. Thus, it is said, can the object of the Hague Rules be circumvented since, for instance, if the master, when sued in tort, is not protected by a limitation, its existence will be of little value to the shipowner. But convenience is not a legal principle; and such a far-reaching departure from the general law can be justified only by clear authority, for *Dunlop* v. *Selfridge*[46] firmly laid down the rule that a person cannot sue on a contract (or, by clear inference, use it in defence) unless he is a party to it, and has given consideration.

The doctrine of vicarious immunity has been most clearly expressed by Scrutton L.J. (obiter) in *Mersey* v. *Rea*[47] in the *words*[48]: " . . . where there is a contract which contains an "exemption clause, the servants or agents who act under that "contract have the benefit of the exemption clause. They can-"not be sued in tort as independent people, but they can "claim the protection of the contract made with their employers "on whose behalf they are acting." In his view, the doctrine was established by the House of Lords in *Elder Dempster & Co. Ltd.* v. *Paterson, Zochonis & Co. Ltd.*,[49] a case of some complication whose precise effect has been debated in courts here and abroad. That view was not shared by Bankes L.J. in *Mersey* v. *Rea*[50]; and although the matter has been considered in this court, the exact point before us has not been decided in this country.

Recently the High Court of Australia and the Supreme Court of the United States have both decided against the doctrine of vicarious immunity on facts similar to those now before us. The Australian High Court in *Wilson* v. *Darling Island Stevedoring and Lighterage Co. Ltd.*[51] held that negligent stevedores were not protected by such a limitation in a bill of lading, and that no principle deducible from the *Elder Dempster* case[52] protected them. The Supreme Court of the United States in *Krawill Machinery Corporation* v. *Robert C. Herd & Co. Inc.*[53] also expressed the view that the *Elder Dempster* case[54] was no authority for the doctrine of vicarious immunity. Whittaker J., in delivering the opinion of the court, said[55]: "A careful reading "of the several lengthy opinions of their Lordships in that case "[*Elder Dempster*[56]] discloses that the question whether a "provision in the bill of lading limiting the liability of the carrier "likewise limits the liability of its negligent agent, though the "agent is neither a party to nor an express beneficiary of the bill "of lading, was not involved in or decided by that case. Nor "has any English case ever held that a bill of lading that "expressly limits the liability of only the carrier nevertheless "applies to and limits the liability of its negligent agent. See "Scrutton on Charterparties (16th ed., 1955) at pp. 286 to 287, "note (g)." He concluded[57]: "Under the common law as "declared by this court, petitioner was liable for all damages "caused by its negligence unless exonerated therefrom, in whole "or in part, by a constitutional rule of law. No statute has "limited its liability, and it was not a party to nor a beneficiary "of the contract of carriage between the shipper and the carrier, "and hence its liability was not limited by that contract."

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[46] [1915] A.C. 847.

[47] 21 Ll.L.Rep. 375.

[48] Ibid. 378.

[49] [1924] A.C. 522.

[50] 21 Ll.L.Rep. 375.

[51] [1956] 1 Lloyd's Rep. 346.

[52] [1924] A.C. 522.

[53] [1959] 1 Lloyd's Rep. 305.

The judge also considered with approval the recent decision of the Australian High Court in *Wilson* v. *Darling Island Stevedoring and Lighterage Co. Ltd.*,[58] and quoted from the judgment of Fullagar J. (with which Dixon C.J. entirely agreed) as follows[59]: "The stevedore is a complete stranger to the contract "of carriage, and it is no concern of his whether there is a bill of "lading or not, or, if there is, what are its terms. He is engaged "by the shipowner and by nobody else, and the terms on which "he handles the goods are to be found in his contract with the "shipowner and nowhere else. The shipowner has no authority "whatever to bind the shipper or consignee of cargo by contract "with the stevedore, and there is, in my opinion, no principle "of law—deducible from the *Elder Dempster* case,[60] or from any "other case—which compels the inference of any contract be- "tween the shipper or consignee and the stevedore. If the "stevedore negligently soaks cargo with water and ruins it, I can "find neither rule of law nor contract to save him from the "normal consequences of his tort." These decisions must carry great weight with us on account of their inherent force and

[54] [1924] A.C. 522.
[55] [1959] 1 Lloyd's Rep. 305, 310.
[56] [1924] A.C. 522.
[57] [1959] 1 Lloyd's Rep. 305, 311.
[58] [1956] 1 Lloyd's Rep. 346, 356, 364.
[59] [1959] 1 Lloyd's Rep. 305, 310, 311.
[60] [1924] A.C. 522.

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precise intention of the reasons given in the relevant portion of the *Elder Dempster* case.[76] It must be remembered that that portion is somewhat subsidiary to the main important decision in the case which turned on the question of seaworthiness. Had it been intended that the immunity of the shipowners arose, not on the special facts and implied agreement, but from some important, general and hitherto undefined legal principle affecting both the law of tort and contract, I have little doubt that the scope of the principle would have been laid down more precisely, and with more detailed reasoning. As Fullagar J. aptly observed in *Wilson* v. *Darling Island Stevedoring and Lighterage Co. Ltd.*[77]: "When no precise legal ground for supporting an immunity can "be found, there must be strong reason for suspecting that the "immunity cannot be supported at all." If the defendants cannot establish the doctrine of vicarious immunity, they are driven to argue that on a proper construction of the bill of lading (and of the Hague Rules which it was to that extent embodying) the limitation was intended to apply to stevedores, and the United States Lines Incorporated was entering into the bill of lading as agent for the defendants. Alternatively, the defendants contend that as bailees (or sub-bailees) they took possession of the plaintiffs' goods by implication on terms that included the limitation. In the final resort they contend that, although not parties, they can enforce the benefit of a clause intended to protect them in a contract between two other parties. It is conceded that this final argument cannot be maintained in this court in the face of *Green* v. *Russell*.[78]

The two former arguments depend on the hypothesis that the limitation clause in the contract itself, or in the Act which the contract incorporated, was intended to protect the stevedores inter alios. I cannot accept that hypothesis.

The bill of lading in both the short and the long form provides that its terms "shall govern the relations whatsoever they may "be between shipper, consignee and the carrier, master and ship "in every contingency wheresoever and whensoever occurring." There is thus no reference to stevedores.

By condition 3 of the short form and condition 1 of the long form the bill of lading is expressed to "have effect subject to the "provisions of the Carriage of Goods by Sea Act of the United "States, approved April 16, 1936, which shall be deemed to be "incorporated therein, and where there is repugnancy the Act is

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[76] [1924] A.C. 522.

[77] [1956] 1 Lloyd's Rep. 346, 361.

[78] [1959] 2 Q.B. 226.

" to prevail." That Act by section 4 (5) lays down the limitation of liability in favour of the " carrier " and the " ship," and no other. The term " carrier " is not defined in the Act, but section 1 (*a*) provides that " the term ' carrier ' includes the owner " or the charterer who enters into a contract of carriage with the " shipper." There is thus no provision in the Act which expressly purports to cover stevedores. The Supreme Court of the United States (which has considerably modified the rigour of the principle contained in *Dunlop* v. *Selfridge*,[79] which binds us) has held that stevedores are not included as beneficiaries in the term " carrier " as used in that Act, and are not protected by its limitation provisions: *Krawill Machinery Corporation* v. *Robert C. Herd & Co. Inc.*[80] I respectfully agree with that. They also held that " carrier " did not include stevedores under the terms of the bill of lading there under review.

The terms of the bill of lading in our case give no ground for reading " carrier " as including stevedores or agents. Condition 24 of the long form provides the limitation of the " carrier's " liability," and by condition 3 " carrier " includes " the ship " her owner operator and demise charterer and also any time " charterer or person to the extent bound by this bill of lading " whether acting as carrier or bailee." Those words are not, in my view, intended to include stevedores. Nor does the right of the carrier and the master under condition 17 to appoint stevedores, master, porters or other agents affect the matter. There is thus nothing in the condition of the bill of lading to show that the contracting parties intended to limit the liability of stevedores or other agents of the carrier for damages caused by their negligence. The bill of lading does not therefore purport to provide any limitation of liability for the stevedores.

On the admitted facts there is nothing to suggest that as to some conditions of the bill of lading the carrier was contracting on the defendants' behalf. The language does not support this contention, and it would be wholly artificial to attempt to carve out parts of the bill of lading as intended to be applicable to an agreement by the carrier on behalf of the stevedores. Indeed, it would be impossible to decide what terms were so intended, and what would be the limits and effect of any contract so made on the defendants' behalf. Nor was there any bailment on implied terms as between the defendants and the plaintiffs. Like the judge, I doubt whether the defendants were ever bailees of the precise intention of the reasons given in the relevant portion of the *Elder Dempster* case.[76] It must be remembered that that portion is somewhat subsidiary to the main important decision in the case which turned on the question of seaworthiness. Had it been intended that the immunity of the shipowners arose, not on the special facts and implied agreement, but from some important, general and hitherto undefined legal principle affecting both the law of tort and contract, I have little doubt that the scope of the principle would have been laid down more precisely, and with more detailed reasoning. As Fullagar J. aptly observed in *Wilson* v. *Darling Island Stevedoring and Lighterage Co. Ltd.*[77]: "When no precise legal ground for supporting an immunity can "be found, there must be strong reason for suspecting that the "immunity cannot be supported at all." If the defendants cannot establish the doctrine of vicarious immunity, they are driven to argue that on a proper construction of the bill of lading (and of the Hague Rules which it was to that extent embodying) the limitation was intended to apply to stevedores, and the United States Lines Incorporated was entering into the bill of lading as agent for the defendants. Alternatively, the defendants contend that as bailees (or sub-bailees) they took possession of the plaintiffs' goods by implication on terms that included the limitation. In the final resort they contend that, although not parties, they can enforce the benefit of a clause intended to protect them in a contract between two other parties. It is conceded that this final argument cannot be maintained in this court in the face of *Green* v. *Russell*.[78]

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[79] [1915] A.C. 847.

[80] [1959] 1 Lloyd's Rep. 305.

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[79] [1915] A.C. 847.

[80] [1959] 1 Lloyd's Rep. 305.

For these reasons, I also agree with the judgment of Diplock J., and I would dismiss the appeal.

UPJOHN L.J., having stated the facts, continued: The defendants seek to limit their liability in this manner in one of two ways. First, they say that if there was no contract between the defendants and the plaintiffs, yet they are entitled to the benefit of the limitation contained in the bill of lading on certain principles which formed the main subject of debate before us. Secondly, they say that, although they did not themselves enter into any contract with the plaintiffs, yet the United States Lines did so as their agent, and they are entitled to the benefit of the limitation clause contained in the bill of lading.

Upon the first point, it is a fundamental proposition of English law that, in general, a man cannot claim the benefit of a stipulation in a contract unless he is a party to that contract, or it has been made on his behalf by his agent, or by a trustee for him. To that rule there are certain exceptions, and the exception which is claimed to cover this case is said to be a principle to be discerned in the well-known and much-debated case of *Paterson, Zochonis & Co. Ltd.* v. *Elder Dempster & Co. Ltd.*[81] The principle is stated in the dissenting judgment of Scrutton L.J.[82] [His Lordship read the passage from the judgment of Scrutton L.J., cited above, p. 120, and continued:]

The shippers appealed to the House of Lords where it is reported sub nom. *Elder Dempster & Co. Ltd.* v. *Paterson, Zochonis & Co. Ltd.*[83] Lord Cave and Lord Finlay referred to the judgment of Scrutton L.J. without disapproval, but neither of them affirmed his judgment in terms which showed that they approved the principle as he had clearly stated it. Lord Sumner, while affirming the dissenting judgment of Scrutton L.J., put the immunity of the shipowner on a rather different basis.

However, the speeches of their Lordships in this case led Scrutton L.J., in the subsequent case of *Mersey Shipping and Transport Co. Ltd.* v. *Rea Ltd.*[84] to restate the principle in these clear terms[85]: [His Lordship read the passage cited by Hodson L.J., ante, p. 120.]

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[81] [1923] 1 K.B. 420.

[82] Ibid. 441.

[83] [1924] A.C. 522.

[84] 21 Ll.L.Rep. 375.

If that is, indeed, part of the law of England, it is a principle which should be of general application to all contracts where the parties contemplate that the main contractor is going to employ a number of sub-contractors to perform specialised services, and not be limited to contracts relating to the carriage of goods; indeed, Scrutton L.J. stated it in such wide and general terms. His remarks, however, were obiter, and Bankes L.J. did not agree with them. Yet it is clear that this court in subsequent cases has not accepted Scrutton L.J.'s general proposition, which appears to be unsupported by earlier authority. Thus, in *Cosgrove* v. *Horsfall*[86] the plaintiff, himself an employee of the London Passenger Transport Board, was travelling on one of their vehicles upon the terms of a free pass, which stated that neither the company nor their servants would be liable for injury however caused. The plaintiff was injured owing to the negligence of the driver of the vehicle, whom he sued. It was held, however, that the defendant driver, although a servant of the London Passenger Transport Board, could not claim the benefit of the condition in the pass. However, it was urged that this case was wrongly decided because the court was not referred to the *Elder Dempster* case.[87]

In the subsequent case of *Adler* v. *Dickson*[88] the majority of this court quite clearly refused to recognise any such general principle. In that case the plaintiff was a passenger in a liner, and she suffered serious injuries due to the negligence of the captain in making fast a gangway. She sued the captain in tort, and the majority of this court held that a clause of immunity in the shipping company's ticket which had been issued to the plaintiff conferred no immunity upon the captain. The *Elder Dempster* case[89] was debated before the court at great length. Denning L.J., it is true, came to the conclusion that on general principles a clause which exempted the main contractor from liability was effective to protect sub-contractors, but the majority of the court refused to recognise any such principle. Jenkins L.J., after a full review of the authorities, said this[90]: "The *Elder Dempster* "case[91] can well be explained by reference to its own facts with- "out ascribing to their Lordships any intention to lay down any

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[85] 21 Ll.L.Rep. 375, 378.
[86] 62 T.L.R. 140.
[87] [1924] A.C. 522.
[88] [1955] 1 Q.B. 158.
[89] [1924] A.C. 522.
[90] [1955] 1 Q.B. 195.
[91] [1924] A.C. 522.

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"such general principle as the defendants here contend for, nor "do I think that their Lordships' language, carefully directed as "it was to the particular facts of the case then before the House, "can fairly be construed as doing so." A little later in his judgment, after citing the passage in the judgment of Scrutton L.J. in the *Mersey Shipping* case[92] which I have quoted, Jenkins L.J. said[93] that he preferred the view of Bankes L.J. to that of Scrutton L.J. Morris L.J. said this[94]: "That [the *Elder Dempster* case[95]] was a somewhat special case, and in my judgment "the reasoning in the speeches in the House of Lords did not "direct any different conclusion from that which was reached in "*Cosgrove* v. *Horsfall.*"[96] He dealt with the *Elder Dempster* case[97] again in this way[98]: "I do not read the decision in the "*Elder Dempster* case[99] as laying it down that if A makes a contract with B by which he agrees not to hold B answerable for "the tort of his servant C, that C is thereby automatically given "immunity if he commits a tort against A."

In my judgment, in that state of the authorities, this court is not at liberty to treat the *Elder Dempster* case[99] as establishing any general principle by way of exception to the general rule that no one can claim the benefit of a stipulation in a contract unless he is a party to that contract, or it is made on his behalf or by a trustee for him.

Mr. Roskill, for the defendants, recognising the difficulty in his way created by these two cases, has in this court confined his argument to submitting that the principle of immunity is limited to cases of carriage of goods. So limited, he says that the defendants, carrying out their duties as stevedores, were within the contemplation of the limitation of liability conferred upon the United States Lines. It was contemplated that the latter would employ stevedoring companies to do the work of loading and unloading, and therefore, upon this narrower principle, they are entitled to the benefit of the limitation. I am not prepared to accept this argument. Without attempting any analysis of the speeches in the *Elder Dempster* case[99] in the House of Lords they do not seem to me to justify even this more limited proposition. Their Lordships' speeches were, as Jenkins L.J. pointed out in *Adler's* case[100] (in the passage I have already quoted), carefully directed to the particular facts before them.

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[92] 21 Ll.L.Rep. 375.
[93] [1955] 1 Q.B. 195.
[94] Ibid. 198, 199.
[95] [1924] A.C. 522.
[96] 62 T.L.R. 140.
[97] [1924] A.C. 522.
[98] [1955] 1 Q.B. 195, 199, 200.
[99] [1924] A.C. 522.

For myself, I can see no reason why the *Elder Dempster* case[101] should be extended to cover the activities of stevedores carrying out ordinary stevedoring duties, unless it is extended to all cases of sub-contractors where it is contemplated that sub-contractors will render services in carrying out the main contract, and, for the reasons I have attempted to give, the authorities, in my opinion, do not justify so wide a proposition.

In reaching the conclusion that this part of the defendants' argument fails I am fortified by the knowledge (as was Diplock J.) that a similar conclusion has been reached by the United States Supreme Court in a unanimous judgment, and by a majority of the High Court of Australia.

I turn, therefore, to the other heading upon which the defendants seek to claim the benefit of the clause in the bill of lading. The bill of lading issued by the United States Lines incorporated a document of portentious length called the long form bill of lading, and also the Carriage of Goods by Sea Act of the United States. Clause 24 of the long form contains the limitation on liability in question, and in terms limits the "carrier's" liability. "Carrier" is defined in clause 3 as including "the ship as "defined herein her owner operator demise charterer and also any "time charterer or person bound by this bill of lading whether "acting a carrier or bailee." The United States Carriage of Goods by Sea Act contains a more restricted definition of "carrier."

The argument, as I understand it, is this. First, "carrier" as above defined includes stevedores. That, however, is not sufficient by itself: see *Cosgrove* v. *Horsfall*,[102] already cited. Secondly, it must also be established that the bill of lading at all events for the purposes of clause 24, was entered into by the United States Lines not only for themselves, but as agents for all other persons properly described as carriers. On the first point stevedores are not, in my judgment, aptly described as acting as carriers; and if they were, for a very short time, properly described as bailees of the oil drum (which, in my opinion, they were not) they were not bailees bound by the bill of lading.

On the second point, the United States Lines did not contract expressly as agents for the stevedores, and I see no necessity to imply such a term in the bill of lading. Furthermore, there was

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[100] [1955] 1 Q.B. 158.

[101] [1924] A.C. 522.

[102] 62 T.L.R. 140.

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no evidence to show that the parties ever intended by any collateral arrangement that the United States Lines should in fact contract as agents for this purpose. In my judgment, the defendants fail to establish either limb of the argument on this part of the case.

I would dismiss this appeal.

Appeal dismissed with costs.
Leave to appeal to the House of Lords.

Solicitors: *Hill, Dickinson & Co.; Ince & Co.*

I. G. R. M.

C. A.

1960
July 14, 15, 25.

Sellers, Pearce and Devlin L.JJ.

CHERRY *v.* INTERNATIONAL ALLOYS LTD.

[1958 C. 787.]

Factory—Dangerous machinery (fencing)—Vehicle—Truck used for carrying materials produced in factory—Workman injured by revolving fan of truck engine while adjusting oil feed—Whether truck "any machinery" requiring to have all dangerous parts fenced—Meaning of "any machinery"—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 14 (1).

An experienced mechanic, while adjusting the oil feed of the engine of a petrol-driven Lister truck in a factory, had his hand injured by the revolving fan of the engine. The fan was unguarded during the operation, which had to be carried out with the engine running. The truck, which had an engine similar to that of a motor-car, was used for the transport of the materials produced in the factory.

The workman claimed damages against his employers alleging, inter alia, that they were in breach of their duty under section 14 (1) of the Factories Act, 1937,[1] to fence "every dangerous part "of any machinery." The trial judge held that the truck was not machinery to which the Act applied. On appeal by the workman:—

Held, that the truck was a vehicle and was not machinery to which section 14 was intended to apply.

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[1] Factories Act, 1937, s. 14: "(1) "Every dangerous part of any machinery, other than prime movers and "transmission machinery, shall be "securely fenced unless it is in such a "position or of such construction as "to be as safe to every person employed or working on the premises "as it would be if securely fenced: ". . ."

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Per Sellers and Pearce L.JJ. The meaning of undefined ordinary English words like "any machinery" in the context of a factory and of the Act of 1937 should be determined by the standards of common sense; and the trial judge, applying those standards, was entitled to find that this truck was a vehicle and not "machinery" within section 14 (post, pp. 144–145, 146–147, 148).

Per Devlin L.J. A truck is a machine and its engine is machinery; but since the object of the Act of 1937 is not to make safety provisions for vehicles which may travel inside or outside a factory, the wide meaning of the general words "any machinery" in section 14 should be cut down so as to exclude such vehicles (post, pp. 148, 149).

Parvin v. *Morton Machine Co. Ltd.* [1952] A.C. 515; [1952] 1 T.L.R. 682; [1952] 1 All E.R. 670, H.L. considered.

Dicta in *Rogers* v. *News of the World*, unreported, C.A., November 19, 1958, *Kimpton* v. *Steel Company of Wales Ltd.* [1960] 1 W.L.R. 527, 530; [1960] 2 All E.R. 274, C.A., and *Bath* v. *British Transport Commission* [1954] 1 W.L.R. 1013, 1015; [1954] 2 All E.R. 542, C.A. applied.

Decision of Gorman J. affirmed.

APPEAL from Gorman J.

The plaintiff, Sidney Frank Cherry, was employed by the defendants, International Alloys Ltd., as a motor mechanic in their factory at Aylesbury where various kinds of alloy materials were produced. A number of trucks were used in the factory for carrying and removing the materials produced there. Some were electrically driven, and there were nine Lister trucks which were petrol-driven with an engine somewhat similar to that of a motor-car. The plaintiff was an experienced mechanic and his duties included the running maintenance of these various trucks and also major and minor repairs.

On November 10, 1956, the plaintiff was attending to one of the Lister trucks in part of the electricians' shop, and after replacing a broken fan belt he took the opportunity of adjusting the oil feed. That adjustment had to take place with the engine running, and the adjustment was made by turning a small wheel with his fingers and then tightening a nut with a spanner. As the plaintiff was tightening the nut by lifting the spanner upwards, the spanner slipped and his right hand was caught by the revolving fan and seriously damaged.

As with the ordinary motor-car, the fan served to cool the engine and was normally enclosed, in this case, by a louvred plate or guard, but this had to be opened downwards to give access to the oil feed for adjustment and so left the fan, during that operation, unguarded. The adjustment had to be done with care, but it was a simple operation and one frequently carried out.

The Lister trucks had been in general and regular use in this factory for many years and there never had been any further or other guard or protection to the fan than the outside louvred plate. The truck was a three-wheeled vehicle of a standard type in common use throughout the country in the larger factories.

The plaintiff brought an action to recover damages from his employers, and alleged, inter alia, that the accident was caused by the defendants' breach of the statutory duty to fence under section 14 of the Factories Act, 1937,[1] as the fan was a dangerous part of machinery and that it was unfenced and was not in such a position or of such construction as to be safe to every person employed or working on the premises as it would be if securely fenced.

The defendants contended that the Lister truck was not machinery to which the Factories Act, and in particular section 14, applied, and that, therefore, there was no duty to fence the fan in question. Gorman J. on July 28, 1959, upheld that submission and found that the truck as used for transport in these premises was not "machinery" within section 14.

The plaintiff appealed from that finding only.

John Thompson Q.C. and *Barry Chedlow* for the plaintiff. It is conceded by the employers that if the Lister truck is "machinery" within the meaning of the Act of 1937, the oil feed which the plaintiff was adjusting at the time of the accident was a "dangerous part" and required to be fenced. The trial judge rejected the submission that the plaintiff was not working in a factory and that is not now pursued. The issue is simply whether the truck is machinery within section 14. Since the accident the employers have fitted a guard, so that the mechanic's hand, when he is adjusting the oil feed, is not exposed to the fan. Thus the fitting of a guard was quite feasible.

This truck was part of the establishment of the factory and used, as were other mechanical means of transport, for the carriage of materials made by the employers. The only definition in the Act of "machinery" is that it includes a "driving belt." The general scheme of the Act is—by sections 12 and 13—to make provision for prime movers and transmission machinery, and—by section 14—to make provision for "every dangerous part "of any machinery" other than prime movers and transmission machinery. There is no logical ground for saying, either because of the structure of the Act or by applying the ordinary canons of construction, that the truck was not "machinery" within the Act.

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[1] See p. 136, ante.

The words "any machinery" are very wide and cannot be construed otherwise than by giving them their natural meaning. In the natural meaning of those words the component parts of the engine of this truck must be regarded as being parts of machinery. The court should not construe those words by considering the consequences of giving them their ordinary meaning, for in *John Summers & Sons Ltd.* v. *Frost*,[2] the House of Lords decided that the Act required a grindstone to be fenced even if as a result it could not be operated.

The words "any machinery" do not apply to the actual products manufactured: *Parvin* v. *Morton Machine Co. Ltd.*[3] The basis of that decision is that the Act of 1937 only applies to machinery used in or ancillary to the manufacture "of other "products," that is, the equipment of the factory. But no distinction is to be drawn between machinery used for the direct manufacture of the ultimate product and machinery used for the transport of the ultimate product. In *Walker* v. *Bletchley Flettons Ltd.*[4] a machine excavating bricks was held to be machinery within the Act of 1937: as was an overhead crane in *Fowler* v. *Yorkshire Electric Power Co. Ltd.*[5]; an overhead ropeway, in *Quintas* v. *National Smelting Co. Ltd.*[6]; an electrically driven belt conveyor, in *Dunn* v. *Birds Eye Foods Ltd.*[7]; and an electric stacking truck, in *Biddle* v. *Truvox Engineering Co. Ltd.*[8]

The principle stated in *Thurogood* v. *Van Den Berghs & Jurgens Ltd.*[9] that any mechanical device used incidentally for the manufacture of the ultimate product is machinery within the Act, even when it is being repaired, applies to the present case. The Lister trucks were the handmaidens of the manufacturing process—a necessary part of that process; and the particular truck was undergoing repair. Nowadays most factories are regarded as co-extensive with the area within the ring fence and include areas set aside for amenities. Although the connection between the amenities and the processes of the factory may be the tenuous one of providing comfort for the employees, yet if machines are used for such a purpose they are machinery within the Act; and therefore the filter plant of a swimming pool or the refrigerator in a canteen may be machinery within the Act. In *Thurogood's* case [9] the ventilating fan was not used in the manufacture of margarine, but it was held to be machinery.

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[2] [1955] A.C. 740; [1955] 2 W.L.R. 825; [1955] 1 All E.R. 870, H.L.

[3] [1952] A.C. 515; [1952] 1 T.L.R. 682; [1952] 1 All E.R. 670, H.L.

[4] [1937] 1 All E.R. 170.

[5] (1939) 55 T.L.R. 375; [1939] 1 All E.R. 407.

[6] [1960] 1 W.L.R. 217; [1960] 1 All E.R. 104.

[7] [1959] 2 Q.B. 265; [1959] 2 W.L.R. 812; [1959] 2 All E.R. 403.

[8] [1952] 1 K.B. 101; [1951] 2 T.L.R. 968; [1951] 2 All E.R. 835.

[9] [1951] 2 K.B. 537; [1951] 1 T.L.R. 557; [1951] 1 All E.R. 682, C.A.

There is no direct authority that can determine the issue in the present case. But apart from *Quintas* v. *National Smelting Co. Ltd.*,[10] the point has not been taken in any of the cases that the machine used for transport of the factory's products was not machinery within the Act. It has always been assumed that it was machinery.

The trial judge was right when he said that if the proper interpretation leads to absurdity it still has to be accepted. Many anomalies are created by the Act of 1937. The same machine in two different places attracts different obligations. A circular saw in an industrial factory is within the Woodworking Regulations, 1948; but if it is on a farm or in a private house it is not covered by those regulations, though the hazards in the latter cases are greater. The wide words "any machinery" were cut down in *Parvin* v. *Morton Machine Co. Ltd.*[11] by reference to other sections of the Act of 1937; but in the present case it is impossible to find anything in the Act which cuts down the wide meaning of the words. They must be given their full application, and in their plain ordinary sense they cover the component parts of a Lister truck. This truck and the fan in it, used as part of the equipment and establishment of a factory, fulfil a function in the complex of activities which alone justify the running of the factory. It is no use having goods produced in a factory by machinery embedded in the floor and having that machinery inundated by a rising tide of unremoved material. A factory contains machinery of three different kinds: (1) productive in the simple sense; (2) handling machinery, such as cranes, lifts, hoists, conveyors or trucks; and (3) machinery necessary to comply with the conditions of the Act in a factory. Section 14 has something to say about each of those three categories. It applies to this truck, because it is "machinery" within the ring fence of the factory and is not within section 13 or 15. It is "other "machinery" for the purpose of section 14.

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[9] [1951] 2 K.B. 537.

[10] [1960] 1 W.L.R. 217.

[11] [1952] A.C. 515.

[SELLERS L.J. The judge seems to have approached the question in the same way in which two Courts of Appeal approached the question whether three steps were a stairway: see *Rogers* v. *News of the World*[12] and *Kimpton* v. *Steel Company of Wales Ltd.*[13]]

Those decisions support the present submission, namely, that while the ordinary person would call this machinery, he would not call the three steps a staircase.

[SELLERS L.J. Would not they call this a vehicle?]

They would not deny that it was machinery.

[DEVLIN L.J. The ordinary man would not be surprised at this truck being called "machinery" but would think it absurd that a radiator fan should be fenced.]

That would be an irrelevant surprise. The only point is whether this is machinery to which section 14 applies.

Patrick O'Connor Q.C. and *Bernard Caulfield* for the employers. If the plaintiff is right, the use of road transport to take raw materials to factories and to remove their products would be illegal, and all workers would have to walk to work from the factory gate, for the wheels of a vehicle are dangerous parts. It was against that background that the trial judge had to decide whether a Lister truck was "machinery" for the purposes of section 14, and he rightly said that it was not the function of the court to define what was meant by machinery to which section 14 applied, but to decide each case on its facts.

If this truck was machinery, there was a breach of the duty to fence, for on the authorities the bonnet would not be fencing and it was common practice to adjust the oil feed when the engine was running. It is conceded that the truck has the attributes of machinery, but applying the common sense test would one in ordinary parlance say of it: "There is some machinery"? Is the Act intended to apply to anything in a factory which has the attributes of machinery? The Act and the regulations made under it are intended to deal with factory machinery and not with motor-vehicles and trucks. The Act shows what machinery is intended, and if one finds an article which in ordinary parlance does not fit into the scheme of the Act the court is entitled to say so.

[DEVLIN L.J. It is really a question of law, whether on the true construction of section 14 and in the light of the Act as a whole it is intended to apply to a truck?]

[12] Unreported, C.A., Nov. 19, 1958.

[13] [1960] 1 W.L.R. 527; [1960] 2 All E.R. 274, C.A.

Before the Act bites, one has to have machinery, and that is a question of fact and not of law. Machinery is left undefined in the Act: see section 152 and the Oxford English Dictionary.

[DEVLIN L.J. The truck has every ingredient of ordinary factory machinery except immobility; there may be a reasonable line of distinction between mobile and immobile fixtures. The ordinary man would tend to think of anything fixed as factory machinery and something going in and out as not part of machinery.]

The right approach is to consider each article as it comes before the court and not to attempt a general definition: see *Whalley* v. *Briggs Motor Bodies Ltd.*[14] If this plaintiff had done the same operation in a maintenance garage, which was a separate entity, there would be no liability on the employer, for it would be under repair and thus a product: see section 151 (6) and *Parvin's* case.[15] In *Nash* v. *Hollinshead*,[16] where it was held that a farm was not a factory, Collins L.J. said that that was not what the Act was dealing with. The courts then considered the factory legislation on a broad basis and that is still the correct approach. The Act does not assist on the present case. Machinery is properly and intentionally not defined, because that which will or will not be machinery will vary from time to time as more things are invented and other things go out of fashion.

[SELLERS L.J. But it is desirable that an employer should know where he stands under the Factory Acts. If the test is elastic he will never know when he is complying with the Act.]

That is always a difficulty; but this truck is in the category of mechanically propelled vehicles and is not within section 14.

Thompson Q.C. in reply. The court should not be frightened off the application of these words to various pieces of equipment on the ground that that would lead to classing as dangerous all sorts of things which in the ordinary course of things might not be considered dangerous. The question is one of law, namely, whether "machinery" in section 14 means less than that word in its ordinary sense would mean? It is of importance to remember that this legislation is designed not primarily to give a cause of action but to prevent accidents. The meaning should be clear and there should be no question of having to decide, after an accident, whether the employer should have done something earlier or not.

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[14] [1954] 1 W.L.R. 840; [1954] 2 All E.R. 193.

[15] [1952] A.C. 515.

[16] [1901] 1 K.B. 700, 706; 17 T.L.R. 352, C.A.

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[SELLERS L.J. That is not so important if this legislation is to be construed not as penal but as remedial legislation.]

The view which has prevailed is that it is penal legislation, and therefore words should not be given artificial meanings, and, equally, their full effect should not be denied because the consequences would be so great.

Cur. adv. vult.

SELLERS L.J. stated the facts and contentions as set out above and continued: The sole question is whether this Lister truck, which would normally be described as a vehicle, is machinery to which the Factories Act, 1937, applies. If it is such machinery, then it is conceded by the defendants that there was a breach of section 14 and the plaintiff is entitled to recover.

The only definition of machinery in the Act is that machinery includes a driving belt. Otherwise it is left to the court to decide in any given case whether the article or plant complained of is machinery as contemplated and intended by the legislature. The judge, who has had long and very active experience of litigation under this much invoked statute, has found confidently that the Act does not apply. It is an opinion I would be reluctant to disturb.

The difficulty in the case is to find the right approach to the problem. Where there is no definition, what are to be the guides? It is conceded in the arguments on each side that little, if any, guidance is available from other sections of the statute, except perhaps to reveal absurdities if the plaintiff's contention is correct.

The safety provisions of Part II of the Act, and in particular sections 12, 13 and 14, are appropriate to what might be called production machinery but give no indication of their applicability to a motor-car, truck or other vehicle where the obvious dangers of a self-contained unit moving about a factory are of a wholly different character from those to which section 14 (1) refers. Under section 22 hoists and lifts, under section 23 chains, ropes and lifting tackle, and under section 24 cranes and other lifting machines, are dealt with separately. By section 24 (8), "lifting "machine" means a crane, crab, winch, teagle, pulley block, gin wheel, transporter or runway, and those are dealt with. The plant included in these sections serves to remove goods in the course of the processes of production, but there is no reference, directly or by implication, to a vehicle such as a motor-car or a truck. The express provisions of section 24 prevent any analogy between cranes and other lifting machines and the mobile truck on the factory floor. The Lister truck under consideration had no lifting power but served only to carry goods.

Under section 151, which deals with the expression "factory," subsection (1) (*vi*) excludes any premises from being a factory if used as ancillary to an industrial undertaking for the purpose of housing locomotives or vehicles where only cleaning, washing, running repairs or minor adjustments are carried out. This is a curious exception if a motor-vehicle is to be regarded as dangerous machinery in whole or in part.

The plaintiff has relied on the truck being a necessary adjunct to the process of manufacture and containing within itself machinery, and has contended that section 14 deals with "other "machinery" than prime movers and transmission machinery, and that the truck falls within "other machinery."

That the word "machinery" need not be interpreted in its widest sense is clear from *Parvin* v. *Morton Machine Co. Ltd.*,[1] where the House of Lords held that section 14 (1) of the Factories Act, 1937, does not apply to machines and machinery manufactured in a factory. In that decision more assistance could be obtained from the construction of the Act than is available here. But if this truck is machinery to which the Act applies, so is an ordinary motor-car while in the factory, at least if used for factory purposes, and that no one, I would have thought, could have described as factory machinery.

The intuitive or instinctive decision, while appropriate to a jury within the ambit of the evidence, is not a satisfying judicial decision, but there are occasions when it may play its part. We were invited to take a common sense view.

I would approach the matter as this court did in *Rogers* v. *News of the World*,[2] and in *Kimpton* v. *Steel Company of Wales*,[3] which relied on and quoted an extract from the judgment of Lord Evershed M.R. in the former case. I do not repeat the quotation. The question was whether three steps constituted a "staircase" within the meaning of section 25 (2). The issue was the same in both *Rogers'* case [4] and *Kimpton's* case [5] and in each case, on slightly varying facts, this court said they were not a staircase. The Master of the Rolls agreed with the trial judge that the construction of the words, which are ordinary English words, must be determined by common sense, and that any attempt at definition or philosophical discussion should be avoided.

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[1] [1952] A.C. 515; [1952] 1 T.L.R. 682; [1952] 1 All E.R. 670, H.L.

[2] Unreported, C.A., Nov. 19, 1958.

[3] [1960] 1 W.L.R. 527, 530; [1960] 2 All E.R. 274, C.A.

[4] Unreported, C.A., Nov. 19, 1958.

[5] [1960] 1 W.L.R. 527.

Somervell L.J. said in *Bath* v. *British Transport Commission*[6] that if words are perfectly familiar all one can do is to state whether or not one regards them as apt to cover or describe the circumstances in question in any particular case.

Like the judge, I would hold that the truck is not machinery to which section 14 was intended to apply. It is a vehicle. I would dismiss the appeal.

PEARCE L.J. The sole question in this appeal is whether the Lister truck was machinery within the meaning of section 14 of the Factories Act, 1937. It was employed in the process of manufacture and spent its life in the factory.

Section 12 deals with prime movers. Section 13 deals with transmission machinery. Section 14 deals with other machinery, starting with the words: "Every dangerous part of any machinery "other than prime movers and transmission machinery shall be "securely fenced." The Act deliberately refrains from defining machinery, and the interpretation section, section 152, merely says "Machinery includes any driving belt." One cannot gain help from paraphrases or further definition since the word machinery is simple and well known. It therefore carries whatever meaning is given to it by the ordinary use of language.

In their widest sense the words "any machinery" would include machinery that has been manufactured in the factory. However, in *Parvin's* case[7] they were given a more restricted meaning which included only such machinery as is employed "in the processes of manufacture or as ancillary to these pro-"cesses," and excluded machinery that has been manufactured in the factory. The House of Lords arrived at its conclusion by a consideration of the terms of the three sections, and what Lord Asquith called their "architecture" and the implications of the Act itself.

Here we have little guidance from the Act itself. The association of section 14 with sections 12 and 13 by position and wording tends towards the view that the section is primarily dealing with the machinery that is at the operative end of the prime movers and transmission, the effective machinery to which the power is directed. Counsel for the defendants points to various absurdities that would arise under the provisions of the Act if they are held to apply to Lister trucks. Any lorries or motor-cars that came to visit the factory would be caught by those provisions.

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[6] [1954] 1 W.L.R. 1013, 1015; [1954] 2 All E.R. 542, C.A.

[7] [1952] A.C. 515, H.L.

It is clear that the provisions of the Act and section 14 itself are not apt for application to trucks and lead to some unreasonable results; and one may fairly assume that trucks were not in the mind of the draftsman. Trucks are self-contained units and the dangers that they create are different dangers from those caused by factory machinery with which the Act was primarily concerned. The danger of being run over or knocked down is wholly different from the dangers that arise in factories from catching, cutting, pinching and crushing. And any dangers that may arise from contact with the internal engines of the trucks are far more frequent in garages (to which the Act does not apply) than in factories.

Nevertheless, if the Act uses plain language that must embrace the Lister truck, the provisions apply to it when it is on factory premises. The question whether an article is machinery, like the question whether any part of the machinery is dangerous, is a question of fact for the court to determine in each case; but " the " question must be judged by reference to the right principle of " law " (see Jenkins L.J. in *Smith* v. *Chesterfield & District Co-operative Society Ltd.*[8]). *Parvin's* case[9] shows that the words " any machinery " in this Act do not include all machinery of every kind, since they do not include machinery that is manufactured by the factory. One is thus entitled to apply these ordinary words in the context of the Act and in the context of a factory.

Although the Lister truck may be " machinery " in the widest sense of the word, it would not normally be described as such. It is more normally classified as a vehicle or a motor-vehicle or a mechanically propelled vehicle. Admittedly a ventilating fan also is more often described as such than as machinery, yet in *Thurogood* v. *Van Den Berghs & Jurgens Ltd.*[10] (where this point was not taken) it was held to be within the Act. However, I doubt if that case is helpful, since a fan which is part of the ventilating system is nearer to machinery than is a vehicle. It does not have so self-contained an identity of its own. Moreover, in the context of a factory especially this truck would not normally be classed as machinery. A person taking a layman's inventory of the contents of a factory would refer to machinery and vehicles under separate headings and would, I think, put the fan in *Thurogood's* case [10] under the former heading and the Lister truck under the latter. But comparison with other border-line articles gives little guidance. In argument we have discussed such things as travelling cranes and mobile drills. But these things do not come within so well-known a class with such well-defined attributes as motor-vehicles.

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[8] [1953] 1 W.L.R. 370, 374; [1953] 1 All E.R. 447, C.A.

[9] [1952] A.C. 515.

[10] [1951] 2 K.B. 537; [1951] 1 T.L.R. 557; [1951] 1 All E.R. 682, C.A.

If, therefore, an ordinary man would not in the context of a factory consider this truck as coming within the classification of machinery, was the judge compelled to hold otherwise? In *Rogers* v. *News of the World*,[11] Lord Evershed M.R. said: "The "first question . . . is this: do these three steps constitute a "'staircase' within the meaning of subsection (2) of section 25 "of the Act? If you get into a debate upon the meaning of the "words 'steps,' 'stairs,' 'stairway,' 'staircase,' you find your"self, I think, in an atmosphere which might have been appro"priate to the ancient sophists; but I agree with the judge that "the construction of these words in this Act, which are ordinary "English words, must be determined according to the ordinary "standards of common sense; and if that is right, I would "myself avoid any attempt at definition and philosophical discus"sion; I would confine myself to the question posed as I have "earlier posed it—looking at these three steps as there illustrated "in these photographs, do they constitute a 'staircase' within "the meaning of subsection (2) of section 25 of the Act? With "all respect to Mr. Thompson's argument, attractive as it always "is, I must say that I would answer that question unhesitatingly "in the negative."

That passage was relied on by Sellers L.J. in *Kimpton* v. *Steel Company of Wales Ltd.*,[12] as was a dictum of Lord Reid in *Richard Thomas & Baldwins Ltd.* v. *Cummings*.[13] Somervell L.J. said in *Bath* v. *British Transport Commission* [14]: "if they "are, as these words are, perfectly familiar, all one can do is to "state whether or not one regards them as apt to cover or describe "the circumstances in question in any particular case."

In *Stephens* v. *Cuckfield Rural District Council*,[15] Upjohn L.J., giving the judgment of the court, used a similar approach

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[10] [1951] 2 K.B. 537.

[11] Unreported, C.A., Nov. 19, 1958.

[12] [1960] 1 W.L.R. 527, 530, C.A.

[13] [1955] A.C. 321, 334; [1955] 2 W.L.R. 293; [1955] 1 All E.R. 285, H.L.

[14] [1954] 1 W.L.R. 1013, 1015.

[15] [1960] 3 W.L.R. 248, 254; [1960] 2 All E.R. 716, C.A.

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and said: "whether a piece of land is properly described as a "'garden' or 'vacant site' or 'open land' for the purposes of "the section is a question to be determined in the circumstances "of each case, and the court whose duty it is to decide it must "exercise its common sense upon the matter."

The judge who has had considerable experience of cases under the factories legislation decided that this Lister truck was not "machinery" and did not come within section 14. If he was not compelled to find otherwise, that was a reasonable decision that conforms with common sense. In my view he was not precluded from such a decision and his judgment was right.

DEVLIN L.J. I have no doubt that a truck is a machine and its engine is machinery, but I think the full width of the words "any machinery" in section 14 of the Factories Act, 1937, must be controlled by consideration of the scope and objects of the Act.

The relevant principle of construction is, in my opinion, correctly and concisely set out in Maxwell on the Interpretation of Statutes (10th ed.) at p. 60. Dealing with the interpretation of general words and phrases, the author says: "While expressing truly enough all that the legislature intended, they frequently express more, in their literal meaning and natural force: "and it is necessary to give them the meaning which best suits "the scope and object of the statute without extending to ground "foreign to the intention. It is, therefore, a canon of interpretation that all words, if they be general and not express and "precise, are to be restricted to the fitness of the matter."

The author cites a number of authorities in support of his general proposition, and he deals in particular with the group of cases covering the construction of the word "inhabitant." He says (at p. 63): "The complex term 'inhabitant' may be cited "as having frequently furnished illustration of this adaptation of "the meaning to what appears to suit most exactly the object "of the Act. In the abstract, the word would include every "human being dwelling in the place spoken of." And he follows that with a number of cases in which that general term has been restricted.

In my judgment the object of the Factories Act, 1937, is not to make safety provision for vehicles, which may travel inside or outside a factory, or for plant and machinery inside them. I think, therefore, that, in accordance with the principle which I have stated, the wide meaning of the words should be cut down so as to exclude vehicles. On those grounds, in my judgment, the appeal should be dismissed.

Appeal dismissed with costs.
Leave granted to appeal to the House of Lords.

Solicitors: *W. H. Thompson; Hair & Co.*

M. M. H.

BERRY *v.* BRITISH TRANSPORT COMMISSION.

[1959 B. No. 3551.]

1960
July 11, 13, 29.

Diplock J.

Malicious Prosecution—Damages supporting action—Statutory offence punishable by fine—Whether action lies—Conviction quashed on appeal—Award of costs by quarter sessions—Whether charge itself sufficient to support action—Whether "fair fame" of person charged injured—Whether charge defamatory—Whether difference between costs awarded and costs incurred sufficient special damage to found action—Regulation of Railways Act, 1868 (31 & 32 *Vict. c.* 119), *s.* 22—*Summary Jurisdiction* (*Appeals*) *Act,* 1933 (23 & 24 *Geo.* 5, *c.* 38), *ss.* 1, 5.

Damages—Costs of proceedings—Measure of damage—Award of costs to complainant—Whether any damage suffered—Costs insufficient to reimburse complainant—Malicious prosecution—Summary Jurisdiction (*Appeals*) *Act,* 1933, *ss.* 1, 5.

The plaintiff was charged on the complaint of a servant or agent of the British Transport Commission with pulling the communication cord on a train, contrary to section 22 of the Regulation of Railways Act, 1868.[1] She pleaded not guilty, but was convicted by the justices, and was fined 20s. and ordered to pay 27s. costs. Having successfully appealed to quarter sessions, which quashed the conviction, the plaintiff brought an action for malicious prosecution against the British Transport Commission, in the statement of claim in which she alleged, inter alia, that by reason of the charge

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[1] Regulation of Railways Act, 1868, s. 22 (as amended): " . . . "Every company shall provide, and "maintain in good working order, in "every train worked by it which "carries passengers, and travels "more than 20 miles without stop-"ping, such efficient means of com-"munication between the passengers "and the servants of the company in "charge of the train as the Board of "Trade may approve. . . . Any "passenger who makes use of the "said means of communication with-"out reasonable and sufficient cause "shall be liable for each offence to a "penalty not exceeding £5."

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she had been injured in reputation and had been held up to ridicule and suffered pain of mind, and had been put to expense in defending herself and had suffered loss and damage: particulars of special damage, itemised as the costs of the defence and of the appeal totalling £62 2s., were given, and the plaintiff claimed damages generally.

On the trial of the preliminary point of law raised by the defendants' contention that the statement of claim disclosed no damage of which the plaintiff was entitled in law to complain and in the premises disclosed no cause of action, and on the basis that the recorder, allowing the appeal, had awarded the plaintiff 15 guineas costs:—

Held, (1) that a charge of a statutory offence punishable by a monetary penalty only did not of itself entail such damages as would support an action for malicious prosecution unless the charge was such as to injure the "fair fame," that was, was necessarily and naturally defamatory, of the person charged (post, pp. 163–164); that since, on a postulation of all the possible circumstances, there could be facts sufficient to support a conviction for the offence under section 22 of the Regulation of Railways Act, 1868, which, if stated of the plaintiff, would not be defamatory of her, the charge itself was insufficient to support the action (post, pp. 166–167).

Savile v. *Roberts* (1868) 1 Ld.Raym. 374; 1 Salk. 13 (sub nom. *Savil* v. *Roberts*); 5 Mod. 405; and *Wiffen* v. *Bailey and Romford Urban District Council* [1915] 1 K.B. 600; 31 T.L.R. 64, C.A. applied.

Rayson v. *South London Tramways Co.* [1893] 2 Q.B. 304; 9 T.L.R. 579, C.A. considered.

(2) That the discretion of quarter sessions to award costs under sections 1 and 5 of the Summary Jurisdiction (Appeals) Act, 1933, was no different from that of a High Court judge in a civil action under R.S.C., Ord. 65, r. 1, or the Court of Appeal under Ord. 55, r. 9, so that no distinction in regard to costs as special damage could be drawn between civil cases and criminal cases which were triable summarily; that, as the recorder, in the exercise of that discretion, had awarded the plaintiff such costs as he considered reasonable, she had been compensated so far as the law chose to compensate her for the costs properly incurred by her in securing her ultimate acquittal and that, therefore, the difference between the solicitor and client costs which she in fact paid and the costs awarded to her by the recorder did not constitute such special damage as to found an action for malicious prosecution (post, pp. 168–169). The statement of claim, accordingly, disclosed no cause of action.

Quartz Hill Consolidated Gold Mining Co. v. *Eyre* (1883) 11 Q.B.D. 674, C.A.; and *Wiffen* v. *Bailey and Romford Urban District Council* (supra) applied.

TRIAL OF A PRELIMINARY ISSUE.

On October 26, 1959, the plaintiff, Betty Pamela Berry, issued a writ against the defendants, the British Transport Commission, claiming damages for malicious prosecution. By her statement of claim she alleged, inter alia, that on January 20, 1959, an employee or agent of the defendants maliciously and without reasonable or probable cause made a complaint against her of having on January 4, 1959, made use of the means of communication between the passengers and servants of the British Transport Commission provided on a certain train then being on the railway, contrary to section 22 of the Regulation of Railways Act, 1868, and procured a summons to be issued by reason of which she appeared before the Brighton Justices on February 13, 1959, when, having pleaded not guilty, she was convicted of the charge and was fined 20s. and ordered to pay 27s. costs; that on July 6, 1959, she appealed against the conviction to the Recorder of Brighton, when the appeal was allowed and the prosecution determined wholly in her favour; and that by reason of the premises she had been injured in reputation and had been held up to ridicule and had suffered pain of mind and had been put to expense in defending herself against the charge and had suffered loss and damage. Particulars of special damage, being the costs of her defence before the justices and the costs of the appeal, totalling £62 2s., were given, and the plaintiff claimed damages generally.

The defendants, inter alia, denied malice or that their servant or agent acted without reasonable or probable cause; they admitted the conviction and that the plaintiff's appeal was allowed, but they contended that the statement of claim disclosed no damage of which the plaintiff was entitled to complain in law, and that in the premises the statement of claim disclosed no cause of action. The point of law raised by that contention of the defendants was ordered to be set down for hearing as a preliminary issue.

The court was informed that the plaintiff had been awarded 15 guineas costs by the recorder and the case was argued on the footing that there was an allegation to that effect in the pleadings.

Neil Lawson Q.C. and *P. M. O'Connor Q.C.* for the defendants. Not every criminal charge brought and dismissed will form the basis of an action for malicious prosecution. A charge will only do so if it is of a scandalous nature or if it is one which "necessarily and naturally" affects the "fair fame" of the person accused: see *Wiffen* v. *Bailey and Romford Urban District Council*,[2] in particular *per* Buckley L.J.[3]; see also *Quartz Hill Consolidated Gold Mining Co.* v. *Eyre*.[4] In *Savile* v. *Roberts* [5] Holt C.J.[6] stressed that the action would not lie unless the indictment contained scandal or invited a punishment involving loss of life or limb or punishment, or there was damage to the plaintiff's property. *Rayson* v. *South London Tramways Co.*[7] was not held to be authority to the contrary in *Wiffen* v. *Bailey and Romford Urban District Council*,[8] and it is submitted that the tests laid down by Holt C.J.[9] are the proper tests to apply today. The charge made against the plaintiff was not of such a character: it was not scandalous, nor did it attack the fair fame of the plaintiff, and it was not punishable other than by a monetary penalty. A charge is not scandalous unless it suggests that the person accused had been guilty of serious misconduct such as dishonesty, disloyalty or sexual misconduct. There are a number of reasons why a passenger in a train might pull the communication cord of a train. He might have been carried past his station while he was asleep, or another passenger might have got out and left his luggage behind. Reliance is placed on the approach of Phillimore L.J. in *Wiffen's* case [10]: "What one must "look at is, not what might be proved in the course of a "prosecution, but what is enough to support a conviction upon the "information or indictment," that is, whether there could be facts sufficient to support a conviction which would not have injured the fair fame of the plaintiff. The suggestion that a passenger pulled the communication cord for his or her convenience, without regard to the convenience of the general public, is not such an attack: see the analogy with slander actionable per se drawn by Bowen L.J. in *Quartz Hill Consolidated Gold Mining Co.* v. *Eyre*.[11] The test is: Would any reasonable person have taken this charge to be an attack on the fair fame of the plaintiff?

The difference between the costs incurred by the plaintiff in defending herself and in representation on appeal and the costs in fact awarded her does not in law constitute damage entitling her to bring this action. At the time of the decision in *Savile* v.

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[2] [1915] 1 K.B. 600; 31 T.L.R. 64, C.A.

[3] [1915] 1 K.B. 600, 608.

[4] (1883) 11 Q.B.D. 674, C.A.

[5] (1698) 1 Ld.Raym. 374; 1 Salk. 13 (sub nom. *Savil* v. *Roberts*); 5 Mod. 405.

[6] 1 Ld.Raym. 374, 378.

[7] [1893] 2 Q.B. 304; 9 T.L.R. 579, C.A.

[8] [1915] 1 K.B. 600.

[9] 1 Ld.Raym. 374, 378.

[10] [1915] 1 K.B. 600, 611.

[11] 11 Q.B.D. 674, 692.

Roberts[12] there were no means whereby costs could be recovered by a successful defendant to criminal proceedings; the reason underlying the third head of damage stated by Holt C.J.[13] was that, since that was so, it was proper that a plaintiff should be able to recover his costs. But now that there is provision for costs to be awarded to a successful defendant, the basis of that third head has gone. Since 1833 costs in a civil matter have been at the discretion of the judge, and since 1848 magistrates have had power to award costs. The costs recovered by the plaintiff in this case were awarded under sections 1 (substituting a new section for section 31 of the Summary Jurisdiction Act, 1879), and 5 of the Summary Jurisdiction (Appeals) Act, 1933, section 5 of which gives the court a discretion. There is therefore now no difference in this respect between civil and criminal proceedings. If a defendant is awarded a lesser sum than is sufficient to compensate him for his costs it is either because he did not ask the court to exercise its discretion in his favour or, if he did ask, because the court awarded him such sum as it thought fit and proper. Expenses incurred in excess of the costs awarded, therefore, are not damages flowing from the act of the prosecutor, but from the order of the court made in the exercise of its discretion: *Quartz Hill Consolidated Gold Mining Co.* v. *Eyre*,[14] *per* Bowen L.J.[15] [Reference was also made to *Rayson* v. *South London Tramways Co.*[16]] In *Wiffen's* case,[17] the Court of Appeal considered itself bound on this point by the *Quartz Hill* case.[18]

Roger Ormrod Q.C. and *Kemp Homer* for the plaintiff. The basis of the early decisions was that the action for malicious prosecution was an action on the case, so that the plaintiff had to prove damage. But in some cases the circumstances raised a presumption of damage: see *Savile* v. *Roberts*.[19] But these proceedings are in the nature of a demurrer and, therefore, the defendants can only succeed if they can show that the plaintiff cannot prove any damage in law. They must satisfy the court that this charge is incapable in law of causing damage to the plaintiff's reputation. [Reference was also made to *Byne* v. *Moore*[20] and *Basebé* v. *Matthews and Wife*.[21]] The question is not whether the charge involves "scandal" in the ordinary sense. At the time of *Savile* v. *Roberts*[22] a charge against a labourer of riotous assembly was not regarded as affecting his fair fame and position, and it is more accurate to say that the question is whether there was prejudice to the plaintiff's reputation, and not to attach undue importance to the word "scandal" used by Holt C.J.[23] In *Wiffen* v. *Bailey and Romford Urban District Council*[24] the charge under section 95 of the Public Health Act, 1875, was made against the plaintiff as the "mere "occupier" of the house and not as the person responsible for its condition: *per* Buckley L.J.,[25] and see also the judgment of Phillimore L.J.[26] All three judgments were given on the basis that that charge involved no imputation against the plaintiff; there was no argument on this aspect of the case and the illustrations given in the judgment of Buckley L.J.[27] of charges in respect of which the action would not lie are obiter. Nor was the charge in *Rayson* v. *South London Tramways Co.*[28] scandalous: the offence under section 51 of the Tramways Act, 1870, did not necessarily involve cheating and it was never suggested that the plaintiff had acted dishonestly. It is, therefore, difficult to see how in *Wiffen's* case[29] the court was able to distinguish *Rayson's* case.[30]

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[12] 1 Ld.Raym. 374.

[13] Ibid. 378.

[14] 11 Q.B.D. 674.

[15] Ibid. 690.

[16] [1893] 2 Q.B. 304.

[17] [1915] 1 K.B. 600.

[18] 11 Q.B.D. 674.

[19] 1 Salk. 13, 14; 1 Ld.Raym. 374, 378–379.

[20] (1913) 5 Taunt. 187.

[21] (1867) L.R. 2 C.P. 684.

Whether a charge is "scandalous" or is an attack on the "fair fame" of the person accused must essentially be considered in relation to the reputation and the social position of the person concerned. The early cases, therefore, give no assistance on this question, which must be one of fact and degree, and each case must be considered on its own facts. The charge made here, that the plaintiff, a respectable woman, pulled the communication cord on a train, suggests that she was a hysterical female acting irrationally or unreasonably. Moreover, the charge must also be looked at in the context of this case in that she complained that she had been assaulted. In all the circumstances this charge was capable of and did damage the reputation of the plaintiff and therefore this action will lie.

The expenses incurred by the plaintiff in her defence and on the appeal over and above the costs awarded her are also sufficient damage to found the action. This matter is not concluded against the plaintiff by *Wiffen's* case.[31] In the early cases the

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[22] 1 Ld.Raym. 374; 1 Salk. 13; 5 Mod. 405.

[23] 1 Ld.Raym. 374, 378.

[24] [1915] 1 K.B. 600.

[25] Ibid. 609.

[26] Ibid. 611.

[27] Ibid. 608, 609.

[28] [1893] 2 Q.B. 304.

[29] [1915] 1 K.B. 600.

[30] [1893] 2 Q.B. 304.

[31] [1915] 1 K.B. 600.

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expenses of the defence were in the forefront of the minds of the judges, and *Quartz Hill Consolidated Gold Mining Co.* v. *Eyre* [32] was the first case in which doubt was cast on the principle that such expenses would support the action. But the proceedings complained of in the *Quartz Hill* case [32] were civil and not criminal proceedings, and the court was at pains to explain why the excess of expenditure incurred over the costs awarded in a civil action was insufficient damage: see the references of Brett M.R.[33] to the difference between "party and party" and "extra" costs. Those references and the observations of Bowen L.J.[34] are clearly directed to costs in civil actions In *Wiffen's* case [35] it was conceded that the plaintiff could not rely on additional costs. The point was not argued; a decision on it was not essential to the decision of the court and, therefore, the observations of the court are obiter and not binding. But in any event those observations were directed to costs in civil proceedings. Buckley L.J. in saying that it was [36] "well established that the "difference between solicitor and client costs and party and "party costs is not legal damage" was clearly going back to the judgment of Brett M.R. in the *Quartz Hill* case,[37] and the terms used, "party and party" and "solicitor and client" costs, are not apt to describe costs incurred in defending a criminal charge.

The recorder's power to award costs arose under section 1 of the Summary Jurisdiction (Appeals) Act, 1933, as to which his discretion was at large, and under section 5 of the same Act in respect of the costs of the appeal, where, again, he had a discretion. There is nothing to show that an order for costs made under either of those two sections is to be made on a compensatory basis: compare sections 1, 2 and 5 of the Costs in Criminal Cases Act, 1952, where provision is made for compensation. The exercise of a discretion and a quick assessment are in no sense comparable to taxed party and party costs in a civil action. It is submitted, therefore, that it would be wrong to apply the *Quartz Hill* case [38] to an action arising out of criminal proceedings.

Lawson Q.C. in reply. A fraudulent intention was a necessary ingredient of the offence under section 51 of the Tramways Act, 1870: *Nimmo* v. *Lanarkshire Tramways Co.*[39] *Rayson's*

[32] 11 Q.B.D. 674.
[33] Ibid. 682.
[34] Ibid. 690.
[35] [1915] 1 K.B. 600.
[36] Ibid. 607.
[37] 11 Q.B.D. 674, 682.
[38] 11 Q.B.D. 674.
[39] 1912 S.C.(J.) 23.

case [40] was, therefore, properly distinguished in *Wiffen* v. *Bailey and Romford Urban District Council.*[41] The proper test to apply is whether damage to the fair fame of the plaintiff is "the necessary and natural consequence of the proceedings": *per* Buckley L.J. in *Wiffen's* case,[42] citing Bowen L.J. in the *Quartz Hill* case.[43] The matter can be tested by analogy with defamation. Had it been written or said of the plaintiff that she had pulled the communication cord of this train without reasonable and sufficient cause, would that have founded an action for defamation? The answer must be "No."

The power of quarter sessions to award costs on appeal is contained in section 1 of the Summary Jurisdiction (Appeals) Act, 1933, which replaced section 31 of the Summary Jurisdiction Act, 1879. Section 5 of the Act of 1933 postulates that there is in fact power to award costs, and provides that the power may be exercised in a certain way. But manifestly Parliament there contemplated, subject to the means of the unsuccessful party, not only that compensatory costs of the appeal should be awarded but also that a sum should be fixed in lieu of taxation. That was what was done here. No useful assistance is to be obtained from a comparison with the Act of 1952. The sum awarded by the recorder was no more nominal than that awarded by the justices in *Wiffen's* case.[44] There might be a number of reasons why that particular sum was awarded: this court does not know what the recorder had in mind or what sum was asked for. The courts have always been chary of encouraging actions for malicious prosecution, and an examination of the older cases makes it clear that, had there then been the right to ask for costs, the actions founded on that head of damage would have been held not to lie.

Cur. adv. vult.

July 13. DIPLOCK J. When I came to consider my judgment there were two matters which I found difficult. The first is what is meant by "scandalous" in this connection. The second relates to the excess costs. Looking back through the cases decided before the modern provisions for costs in civil actions, it appears that a plaintiff was liable to amercement if his action failed, and that the reason why the action for malicious prosecution did not lie unless there had been distraint or trespass was

[40] [1893] 2 Q.B. 304.

[41] [1915] 1 K.B. 600.

[42] Ibid. 608.

[43] 11 Q.B.D. 674, 689.

[44] [1915] 1 K.B. 600.

not that the costs of the defence were not damage in law but that the law provided a sufficient remedy.

Lawson Q.C. referred to Bullen and Leake's Precedents of Pleadings, 3rd ed. (1868), pp. 355, 356, *Byne* v. *Moore*,[45] *Henley* v. *Burstal*,[46] *Chamberlain* v. *Prescot*[47] and *Savile* v. *Roberts*.[48] It is submitted that a "scandalous" charge involves an attack on the fair fame of the person charged. The early cases appear to afford very little assistance on the question of scandal, except that a scandalous charge was one which involved an attack on the fair fame of the person accused. See the way in which it was put by Holt C.J. in *Savile* v. *Roberts*[49]: "The damage to "a man's fame, as if the matter whereof he is accused be scandalous," and compare the controversy between slander actionable per se and slander which is not actionable without proof of damage. It must be conceded that the concept of "fair fame" may alter from time to time with a changing society, and that what was scandalous in 1698 may not be so today. It was held in *Wiffen* v. *Bailey and Romford Urban District Council*[50] and, obiter, in *Quartz Hill Consolidated Gold Mining Co.* v. *Eyre*[51] that the charge must necessarily and naturally involve an attack on the fair fame of the plaintiff, but in determining whether a charge is of that character the court must have regard to the prevailing conditions of society and the fact that today offences fall into two broad groups, the common law type of offence, and the statutory offences such as obstructing the highway, riding a bicycle without lights and pulling the communication cord on a train, which do not involve dishonesty, immorality or disloyalty: see the illustrations given by Buckley L.J. in *Wiffen's* case.[52]

As to whether costs were damage in law, see *Barrat and Hodsoll* v. *Collins*,[53] and, for a case decided after the Civil Procedure Act, 1833, *Cotterell* v. *Jones and Ablett*.[54] The modern approach in criminal as well as civil proceedings is that, where a plaintiff has a right to costs, or has in fact obtained an order for costs, any additional costs incurred are insufficient to support the action. The result of the provisions whereby costs can be recovered in civil proceedings was to reduce the scope of the action for malicious prosecution, and the position is accurately

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[45] 5 Taunt. 187.
[46] (1657) T.Raym. 180.
[47] Ibid. 135.
[48] 1 Ld.Raym. 374.
[49] Ibid. 378.
[50] [1915] 1 K.B. 600.
[51] 11 Q.B.D. 674.
[52] [1915] 1 K.B. 600, 608–609.
[53] (1825) 10 Moore (J.B.) 446.
[54] (1851) 11 C.B. 713.

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set out in Halsbury's Laws of England, 3rd ed. (1958), vol. 25, p. 367, para. 717, which is adopted as part of the argument for the defendants. This is a form of action which has been discouraged by the courts; a fortiori where there is provision for costs which has been utilised.

Ormrod Q.C., for the plaintiff, referred to *Byne* v. *Moore*.[55] The statement by Holt C.J. in *Savile* v. *Roberts*[56] that "If a "man be falsely and maliciously indicted of any crime that may "prejudice his fame and reputation, he may bring his action, for "he is falsely scandalised by the malice of the prosecutor, and "this is a damage for which the law gives an action," is of even greater application today than in 1699. For the most recent views on this matter see *Mohamed Amin* v. *Jogendra Kumar Bannerjee*.[57]

Further assistance on the matter of costs may be gained from *Sinclair* v. *Eldred*[58] and *Grace* v. *Morgan*.[59] It is submitted that where there has been taxation of costs, that is conclusive as to the plaintiff's damage and no more can be recovered, but that where there has been no taxation the position is quite different.

Cur. adv. vult.

July 29. DIPLOCK J. read the following judgment: This case comes before me for the determination of a point of law raised upon the pleadings. It is a difficult point of law, and I am much indebted to counsel on both sides for their assistance in elucidating it. The action is brought by the plaintiff for damages for malicious prosecution in respect of a statutory offence which is punishable not by imprisonment but by a monetary penalty only. She alleges that an employee of the defendants "maliciously and "without reasonable or probable cause laid before a justice of the "peace for the County Borough of Brighton a complaint against "the plaintiff of having on January 4, 1959, unlawfully, wilfully "and without reasonable and sufficient cause made use of the "means of communication between the passengers and servants "of the British Transport Commission provided on a certain train "then being on the railway contrary to the provisions of section 22 "of the Regulation of Railways Act, 1868, and procured the said "justices to issue a summons directed to the plaintiff to appear

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[55] 5 Taunt. 187.
[56] 1 Salk. 13, 14.
[57] [1947] A.C. 322; 63 T.L.R. 433, P.C.
[58] (1811) 4 Taunt. 7.
[59] (1836) 2 Bing.N.C. 534.

"before the Court of Summary Jurisdiction, County Borough of "Brighton, on February 5, 1959." The statement of claim goes on to allege that the plaintiff was convicted of the charge before the magistrates, that she subsequently appealed to the Recorder of Brighton, and that the appeal was allowed, and the prosecution wholly determined in favour of the plaintiff.

Paragraph 4 of the statement of claim is as follows: "By "reason of the premises the plaintiff has been injured in reputa- "tion and has been held up to ridicule and has suffered pain of "mind and has been put to expense in defending herself against "the said charge, and has suffered loss and damage." The particulars of the special damage are: "Cost of defence at "magistrates' court as per account of Messrs. Gates & Company, "£8 10s. 0d. Costs of appeal as per account of Messrs. Wright, "Johnson & Cheales, £53 12s. 0d."—making a total of £62 2s. The prayer is for "damages" generally.

Although it does not appear on the face of the statement of claim, I was informed that the plaintiff was awarded 15 guineas costs against the complainant by the recorder, and that credit is given for this figure in the account of Wright, Johnson & Cheales referred to in the statement of claim. The case has been argued before me on the basis that there is an allegation to this effect in the pleadings. For reasons which will appear (see *Cotterell* v. *Jones and Ablett*[1]) the absence of such an allegation would, if anything, increase the legal difficulties of the plaintiff.

In the amended defence the defendants raise the question of law which I have to determine in the following form: "The "defendants will contend that the statement of claim discloses "no damage of which the plaintiff is entitled to complain in law "and in the premises the statement of claim discloses no cause "of action."

The action for malicious prosecution was an action on the case in consimili casu to the action brought by the old writ of conspiracy which lay only when there was a combination between two or more persons maliciously to indict the plaintiff for treason or felony. The action on the case for malicious prosecution was available against a single defendant, and could be founded upon any form of legal proceedings, whether civil or criminal, brought maliciously and without any reasonable or probable cause against the plaintiff by the defendant. As the action was in case, however, damage was an essential ingredient.

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[1] (1851) 11 C.B. 713.

The early cases, which are conveniently summarised in the judgment of Parker C.J. in *Jones* v. *Givin*,[2] had left it uncertain what kind of damage was necessary to found the action. This was finally settled in the classic judgment of Holt C.J. in 1698 in *Savile* v. *Roberts*,[3] of which there are ten different reports, the most valuable being found in 1 Lord Raymond's Reports at p. 374, and 5 Modern Reports at p. 405. Although the former report is most frequently cited, there are phrases in it which raise apparent difficulties that are only soluble by comparing it with the other reports of the same judgment.

In *Savile* v. *Roberts* [3] the plaintiff had been indicted by Savile before the West Riding Quarter Sessions for riot and rout while engaged in stopping up a highway. He had been acquitted by the jury and brought his action for malicious prosecution. Holt C.J., according to the report in 1 Lord Raymond's Reports, said [4]: "There are three sorts of damages, any of which would be "sufficient ground to support this action. 1. the damage to a "man's fame, as if the matter whereof he is accused be scan-"dalous . . . ", but he added: "there is no scandal in the crime "for which the plaintiff in the original action was indicted. "2. The second sort of damages, which would support such an "action, are such as are done to the person; as where a man is "put in danger to lose his life, or limb, or liberty . . . ", but he added: "these kinds of damages are not ingredients in the present "case. 3. The third sort of damages, which will support such an "action, is damage to a man's property, as where he is forced to "expend his money in necessary charges, to acquit himself of the "crime of which he is accused "—" which," said Holt C.J., "is "the present charge."

Most of the difficulties in the later cases on malicious prosecution seem to me to flow from the fact that *Savile* v. *Roberts* [4] is nearly always cited from Lord Raymond's report of the judgment. Holt C.J. says in terms there that neither the first nor the second head of damages was an ingredient in the prosecution of Roberts for riot and rout. Yet these crimes were common law misdemeanours or, in the language of the seventeenth century, "trespasses," punishable with imprisonment, and one would have supposed that such a charge involved "scandal" even in 1698.

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[2] (1713) Gilb. Cases in Equity 185.

[3] (1698) 1 Ld.Raym. 374; 1 Salk. 13 (sub nom. *Savil* v. *Roberts*); 5 Mod. 394; 3 Salk. 16; Carth. 416; 12 Mod. 208; Holt K.B. 150, 193; (sub nom. *Roberts* v. *Savill*) 5 Mod. 405; Holt K.B. 8.

[4] 1 Ld.Raym. 374, 378.

An examination of the other reports of *Savile* v. *Roberts* and of contemporaneous cases of false imprisonment and slander, however, shows (1) as regards the first head of damages, that the expression "scandalous" was used as a synonym of "slanderous" in the sense of the kind of imputation which, if spoken, was at that date slander actionable per se; and (2) as regards the second head of damages, that actual loss of liberty either by arrest on mesne process or final process in civil actions or by imprisonment pending trial or as a punishment in criminal cases, had to be proved, and the mere fact that the charge exposed the plaintiff to risk of imprisonment if he were convicted was not enough to support the action under the second head.

As is clearly pointed out by Parker C.J. in *Jones* v. *Givin*,[5] Holt C.J. was not saying that there are two categories of crime which, if charged, can give rise to an action for false imprisonment, namely, (a) crimes which involve "scandal," and (b) crimes which are punishable corporeally. He was saying that any legal proceedings brought maliciously and without any reasonable or probable cause were actionable if they caused damage to the plaintiff's property, to his person or to his fame, and that the test whether they caused damage to his fame was whether an oral accusation of the crime would have amounted to slander actionable per se. In 1698 a distinction was beginning to be drawn between libel and slander (see *King* v. *Lake*[6]), and possibly as a result of this a restricted view was current as to what oral accusations of crime amounted to slander actionable per se. Holt C.J., himself, as appears from his judgment in *Ogden* v. *Turner*,[7] took the view that such accusation was only actionable if the crime involved an "infamous" or "villainous" punishment, that is, disqualified the convicted person from thereafter giving evidence in legal proceedings. That it was punishable by imprisonment was not enough. This is why he said in *Savile* v. *Roberts*[8] that the first head of damages was not present. This also, I apprehend, is the explanation of such contrasting seventeenth-century cases as *Low* v. *Beardmore*[9] and *Henley* v. *Burstal*.[10] In the former case an indictment on a charge of rescue was held not to involve the first head of damages; in the latter, which was cited with approval in *Savile* v. *Roberts*,[11] a charge against a justice of the peace for delivering a vagrant out of custody without examination contrary to law was held to involve the first head of damages, presumably because the oral accusation would have defamed the plaintiff in his office as a justice of the peace, and would have been actionable per se.

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[5] Gilb. Cases in Equity 185.

[6] (1667–70) Hardres 470.

[7] (1704) 6 Mod. 104.

[8] 1 Ld.Raym. 374, 378.

[9] (1655) T.Raym. 135.

[10] (1657) T.Raym. 180.

[11] 1 Ld.Raym. 374.

The restrictive interpretation current in the latter half of the seventeenth and early years of the eighteenth centuries upon the categories of crime in respect of which an oral accusation constituted slander actionable per se gradually fell into disfavour, and the courts eventually (see *Webb* v. *Beavan* [12]) reverted to the ancient rule laid down in *Spencer* v. *Shory*,[13] that the oral imputation of any crime punishable corporeally was slander actionable per se. (See also *Onslow* v. *Horne*,[14] where De Grey L.C.J., as early as 1771, doubted the correctness of *Ogden* v. *Turner*.[15]) Had the ratio decidendi of Holt C.J. in *Savile* v. *Roberts* [16] been followed, the category of crimes which, if charged, would involve the first head of damages in an action for malicious prosecution would have expanded correspondingly; but I can find no clear indication in the cases whether it did or not.

In 1813 one finds Mansfield C.J., in *Byne* v. *Moore*,[17] regarding it as insufficient to show in an action for malicious prosecution for assault where damages were claimed only under the first head, that the crime charged was punishable corporeally. He regarded it as necessary that " scandal " also should be involved. What he in 1813 meant by " scandal " is not clear. Sir James Mansfield adopted a conservative approach to defamation (see *Thorley* v. *Lord Kerry*,[18] in which he regretted the distinction drawn in the course of the last 150 years between libel and slander), and it may well be that even as late as 1813 he regarded an oral accusation of assault, although punishable by imprisonment, as not constituting slander actionable per se.

It seems indeed likely that, but for the decision in *Rayson* v. *South London Tramways Co.*,[19] the courts would have continued to follow the ratio decidendi of Holt C.J. in *Savile* v. *Roberts*,[20] and would have regarded the action for malicious prosecution under the first head of damages as applicable to all crimes the oral accusation of which constituted slander actionable per se and as limited to such crimes.

In *Quartz Hill Consolidated Gold Mining Co.* v. *Eyre* [21] Bowen

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[12] (1883) 11 Q.B.D. 609.
[13] (1599) Cro.Eliz. 709.
[14] (1771) 3 Wilson K.B. 177, 186.
[15] 6 Mod. 104.
[16] 1 Ld.Raym. 374.
[17] (1813) 5 Taunt. 187, 191.
[18] (1812) 4 Taunt. 355.
[19] [1893] 2 Q.B. 304, C.A.
[20] 1 Ld.Raym. 374.
[21] (1883) 11 Q.B.D. 674, C.A.

L.J.[22] drew attention to the analogy between malicious persecution and slander actionable per se, and applied it to the imputation upon the credit of a trading corporation involved in the bringing of a winding-up petition. He said[22]: "Put those two classes "together—the class of malicious prosecutions which the law "recognises and the class of slanders which the law recognises— "and although the two may not be based on exactly the same "principles, perhaps a student may find material for pursuing "the analogy between them." But in *Rayson* v. *South London Tramways Co.*,[23] in which the only argument addressed to the court was on whether proceedings for a penalty under section 51 of the Tramways Act, 1870, for travelling without payment of fare were proceedings in respect of a criminal offence, and in which *Savile* v. *Roberts*[24] was never even referred to, the Court of Appeal appeared to hold that any charge of a criminal offence, even if not punishable corporeally but only by a monetary penalty, was sufficient to found an action for malicious prosecution (thus departing wholly from any analogy with slander actionable per se). I say "appeared to hold" because the decision was whittled down in *Wiffen* v. *Bailey and Romford Urban District Council*[25]; but to whittle it down without overruling it, as being given per incuriam, involved what I think, with the greatest respect, was a misunderstanding of the judgment in *Savile* v. *Roberts*.[26] Buckley and Phillimore L.JJ. treated the first and second heads of damages as setting out two categories of crime which, if charged, can give rise to an action for malicious prosecution. They certainly regarded the second head as satisfied if the crime charged were punishable by imprisonment even although the plaintiff had not in fact been imprisoned. They regarded the first head as satisfied if the crime charged, although not punishable with imprisonment, conveyed an imputation upon the plaintiff's fair fame.

I have given my reasons for thinking that this was not the true effect of the judgment of Holt C.J. in *Savile* v. *Roberts*,[26] and that *Rayson's* case[27] and *Wiffen's* case[28] mark a departure from the old law. I am, of course, bound by those decisions. Their effect is that: (1) a charge of a statutory offence punishable by fine only does not of itself entail such damages as will support an action for malicious prosecution; but (2) such a charge will do so if it injures the " fair fame " of the person charged.

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[22] 11 Q.B.D. 674, 692.

[23] [1893] 2 Q.B. 304.

[24] 1 Ld.Raym. 374.

[25] [1915] 1 K.B. 600; 31 T.L.R. 64, C.A.

[26] 1 Ld.Raym. 374.

[27] [1893] 2 Q.B. 304.

[28] [1915] 1 K.B. 600.

What, then, is the test as to whether or not a charge injures the " fair fame " of the person charged? In *Wiffen's* case [28] it was expressed by Buckley L.J. as follows [29]: " The matter is in " a sense criminal, but that does not conclude the question. I " have to see whether the institution of these proceedings neces" sarily and naturally conveyed an imputation affecting the " plaintiff's fair fame." Phillimore L.J. put it in this way [30]: " It seems to me that what one must look at is, not what might " be proved in the course of a prosecution, but what is enough " to support a conviction upon the information or indictment. " If it will be enough to support a conviction upon the informa" tion or indictment that the person charged has done something " which does not injure his fair fame, no scandal is involved in the " prosecution. . . . ' Scandal,' as the cases show, means some" thing derogatory to the fair fame of the person charged." Finally, Pickford L.J. said [31]: " It seems to me that we have not " to consider what facts might be proved in order to support the " prosecution, but whether the charge of itself as a necessary and " natural consequence impairs the fair fame of the person against " whom it is made."

The charge in that case was one of failure to comply with an abatement notice served in respect of a nuisance under sections 94 and 95 of the Public Health Act, 1875. All three Lords Justices examined various hypothetical circumstances in which a prosecution might have been brought successfully under section 95 of the Public Health Act, 1875, in which the facts proved would not reflect upon the fair fame of the person charged. Having reached the conclusion that such circumstances might exist—irrespective of whether they in fact existed in the actual case in respect of which the action for malicious prosecution was brought—they came to the conclusion that " scandal " was not *necessarily and naturally* entailed in the institution of the proceedings.

The decision in *Rayson* v. *South London Tramways Co.* [32] was explained upon the ground, of which no trace appears in the judgment of Brett M.R., that the charge with which *Rayson's* case [32] was concerned, namely, of attempting to avoid payment of the proper fare, necessarily involved an intent to defraud which reflected on the fair fame of the person charged. This had in fact been decided, but only by the Scottish courts, between the date of *Rayson's* case [32] and *Wiffen's* case [33]: see *Nimmo* v. *Lanarkshire Tramways Co.*[34]

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[28] [1915] 1 K.B. 600.

[29] Ibid. 608.

[30] Ibid. 611, 612.

[31] Ibid. 614.

[32] [1893] 2 Q.B. 304.

It seems to me, therefore, that, under the law as laid down in *Wiffen's* case,[35] the test that I have to apply is to consider whether there could be facts sufficient to support a conviction under section 22 of the Regulation of Railways Act, 1868, which would not injure the "fair fame" of the person charged. If there could, the charge does not of itself entail such damages as would support an action for malicious prosecution. The allegations which were actually made against the plaintiff in the prosecution of which she complains are irrelevant for this purpose, although, if the action lies at all, they would be very relevant to the issues of malice and absence of reasonable or probable cause.

Section 22 of the Regulation of Railways Act, 1868, provides that "Any passenger who makes use of the said means of com- "munication"—scilicet, a means of communication between the passengers and the servants of the company in charge of the train—"without reasonable and sufficient cause shall "be liable for each offence to a penalty not exceeding £5." There are many circumstances in which a passenger might pull the communication cord without cause which was both reasonable and sufficient. He might, for instance, do so if he had been asleep and woke up to find the train starting to leave, upon a non-stop journey of 100 miles, the station at which he desired to alight, or if he discovered just as the train was leaving that he had left some valuable property behind him on the platform, or that some other traveller who had just alighted had left some valuable property in the carriage. He might, indeed, think it worth while paying the penalty to attain the result. Would a conviction on a set of facts such as these damage the "fair fame" of the person convicted? It is difficult to know what is the correct test. One is tempted to say that this is surely a question of fact for the jury and not a question of law for the judge, but in *Wiffen's* case [36] the jury had found a verdict for the plaintiff, and the matter was treated as a question of law. The case was not sent back for retrial. I am, accordingly, bound to treat it as a question of law.

Each of the members of the court in *Wiffen's* case [36] stated the test to be whether the plaintiff's "fair fame" would be affected, impaired or injured. This expression, which so far as I know is not a term of art with a precise legal meaning, is borrowed from the *Quartz Hill* case,[37] where it was used by Brett M.R.,[38] without definition, and by Bowen L.J.,[39] with the suggestion that it was analogous to the words "actionable "per se" in cases of slander, an analogy expressly approved by Phillimore L.J. in *Wiffen's* case.[40] As a result of what I cannot but regard as the unfortunate decision in *Rayson's* case,[41] this analogy, which in my view accurately expresses the ratio decidendi of the earlier decisions, is no longer perfect, since an accusation that a person had committed an offence under section 51 of the Tramways Act, 1870, would not be actionable per se (cf. *Ormiston* v. *Great Western Railway Co.*[42]) although a charge of such an offence would support an action for malicious prosecution.

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[33] [1915] 1 K.B. 600.

[34] 1912 S.C.(J.) 23.

[35] [1915] 1 K.B. 600.

[36] Ibid.

I must assume, however, that the Court of Appeal in *Wiffen's* case[43] intended some test which could be applied as a matter of law in determining whether a charge was injurious to a person's "fair fame" so as to support an action for malicious prosecution. Although the court refrained from using the expression "defamatory"—a term of art which would have made their meaning clear—I think that, put at its highest in the plaintiff's favour, the test that they must have been intending to lay down was: Was the charge one which necessarily and naturally is defamatory of the plaintiff? In effect, I have to ask myself a question, which is the converse of the question of law involved in actions for defamation: Is the statement that the plaintiff was charged with the offence capable of a *non*-defamatory meaning? And to obtain the answer to that question I have to postulate all possible circumstances in which a person might be successfully prosecuted for the offence of which the plaintiff was charged, and ask myself if I can conceive of facts which, if stated of the plaintiff, would not be defamatory of her, that is, lower her in the estimation of right-thinking members of society generally (*Sim* v. *Stretch*[44]), although they would support a conviction for that offence.

On such an approach, it seems to me that a statement alleging the sort of facts which I have indicated above as being sufficient to support a conviction for an offence under section 22 of the Regulation of Railways Act, 1868, would not be defamatory of the person alleged to be guilty of them. In my view, therefore, the matter whereof the plaintiff was accused was not "scandalous" and the action cannot be supported under the first head of damages of Holt C.J.

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[37] 11 Q.B.D. 674.
[38] Ibid. 683 et seq.
[39] Ibid. 692.
[40] [1915] 1 K.B. 600, 610, 611.
[41] [1893] 2 Q.B. 304.
[42] [1917] 1 K.B. 598; 33 T.L.R. 171.
[43] [1915] 1 K.B. 600.
[44] (1936) 52 T.L.R. 669, H.L.

This, however, does not dispose of the matter. The plaintiff has another string to her bow. I have next to consider whether the difference between the costs actually incurred by the plaintiff and those which she was awarded by the recorder constituted special damage under Holt C.J.'s third head. In *Quartz Hill Consolidated Gold Mining Co.* v. *Eyre*[45] it was held that in a civil action (in that case a winding-up petition) the difference between the actual costs incurred and party and party costs awarded could not be recovered as special damage. The ground for this decision, for which there is abundant authority in the earlier cases such as *Sinclair* v. *Eldred*,[46] was that "the only "costs which the law recognises, and for which it will com-"pensate [a litigant] are the costs properly incurred in the "action itself. For those the successful defendant will have "been already compensated, so far as the law chooses to com-"pensate him. If the judge refuses to give him costs, it is "because he does not deserve them: if he deserves them, he "will get them in the original action: if he does not deserve "them, he ought not to get them in a subsequent action. "Therefore the broad canon is true that in the present day, "and according to our present law, the bringing of an ordinary "action, however maliciously, and however great the want of "reasonable and probable cause, will not support a subsequent "action for malicious prosecution" (*per* Bowen L.J.[47]).

This rule did not apply in criminal cases in which, originally, there was no power to award costs. Accordingly, where the malicious prosecution complained of was in respect of an indictable offence—and the industry of counsel has discovered no example of malicious prosecution in respect of a summary offence before *Rayson's* case[48] in 1893 — the costs incurred by the plaintiff in defending himself were recoverable as special damage. In the case of summary offences, however, since 1848 the justices have had the power in their discretion to order that the prosecutor or complainant shall pay to the defendant "such costs "as to such justices shall seem just and reasonable." In

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[45] 11 Q.B.D. 674.

[46] (1811) 4 Taunt. 7.

[47] 11 Q.B.D. 674, 690.

[48] [1893] 2 Q.B.D. 304.

Wiffen's case,[49] the Court of Appeal, applying the decision in the *Quartz Hill* case,[50] held that the difference between the solicitor and client costs incurred by the plaintiff and the five guineas costs that he was awarded by the magistrates did not for similar reasons constitute special damage sufficient to support an action for malicious prosecution. The matter was not argued in *Wiffen's* case [51] as counsel conceded, and the Court of Appeal accepted, that they were bound by the earlier decision in the *Quartz Hill* case.[52] It has, however, been argued on behalf of the plaintiff in the present case that in these circumstances the expression of opinion in *Wiffen's* case [53] was per incuriam or obiter, and is not binding upon me since the principles upon which costs are awarded in criminal cases are not the same as those upon which they are awarded in civil cases.

I do not think that any distinction is to be drawn in law between civil and criminal cases which are tried summarily. In the present case the costs were awarded by the recorder under the powers given to him by the Summary Jurisdiction (Appeals) Act, 1933. By section 1 of that Act, which substitutes a new section for section 31 of the Summary Jurisdiction Act, 1879, the Court of Quarter Sessions, exercising its appellate jurisdiction, is given power to make such order as to costs to be paid by either party as they think just, and by section 5 it is provided that a Court of Quarter Sessions may, in the exercise of their power to award costs, (i) where they allow the appeal, direct that there shall be included in any costs to be paid by the respondent to the appellant the costs properly incurred in the proceedings before the Court of Summary Jurisdiction or such fixed sum as the Court of Quarter Sessions may consider reasonable in respect of the costs so incurred by him, (ii) in any case, in lieu of directing a taxation of costs, fix a sum to be paid by way of actual costs by either party to the appeal; and in fixing for the purposes of this subsection the amount of any costs to be paid by any party to an appeal shall have regard to his means.

Subject to the qualification that quarter sessions shall have regard to the means of the party whom they order to pay costs, this gives to quarter sessions a discretion to award such costs as they consider reasonable. The discretion of quarter sessions is in law no different from that of a High Court judge in a civil action under R.S.C., Ord. 65, r. 1, or the Court of Appeal under Ord. 58, r. 9. In the present case the recorder, exercising his discretion, awarded the plaintiff 15 guineas costs. It seems to me that, in the words of Bowen L.J.,[54] for the costs which the plaintiff has properly incurred in securing her ultimate acquittal she will have "been already compensated, so far as "the law chooses to compensate" her.

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[49] [1915] 1 K.B. 600.
[50] 11 Q.B.D. 674.
[51] [1915] 1 K.B. 600.
[52] 11 Q.B.D. 674.
[53] [1915] 1 K.B. 600.

There is no allegation in the pleadings that, in fixing the amount of the costs which he awarded to the plaintiff, the recorder took into account the means of the complainant. Indeed, having regard to the fact that the British Transport Commission was responsible for the prosecution, it seems plain that no such allegation could have been made. If a case were to arise in which it was established that the costs awarded to the plaintiff had been reduced because of the poverty of the prosecutor, a nice point would arise as to whether the amount by which the costs were so reduced constituted special damage recoverable in a subsequent action for malicious prosecution. A somewhat similar point arose in *Cotterell* v. *Jones and Ablett*[55] where an action for malicious prosecution was brought in respect of the procuring of a civil action to be brought by an insolvent plaintiff. There is an interesting argument in the report as to whether the costs not recoverable from the plaintiff would constitute damages under the third head of Holt C.J.[56] sufficient to support the action for malicious prosecution. But the question remained unsolved since the court decided the matter on the ground that there was no allegation that the successful defendant had asked for his costs, and that accordingly his failure to recover them was due to his own remissness and not to the insolvency of the plaintiff. As, however, there is no allegation in the present case that the 15 guineas costs awarded to her were reduced as a result of the recorder having regard to the means of the prosecutor, this problem does not appear to me to arise. In my view, the difference between the solicitor and client costs which the plaintiff in fact incurred and the 15 guineas costs awarded to her by the recorder did not constitute such special damage as to found an action for malicious prosecution under Holt C.J.'s third head of damages.

I accordingly hold that the statement of claim discloses no

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[54] 11 Q.B.D. 674, 690

[55] 11 C.B. 713.

[56] 1 Ld.Raym. 374.

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cause of action. This decision upon the issue before me disposes of the action. There should be added to my order that judgment be entered for the defendants in the action. That must follow, I think.

Judgment for the defendants with costs.

Solicitors: *M. H. B. Gilmour; Booth & Blackwell for Wright, Johnson & Cheales, Brighton.*

J. F. L.

1960
Oct. 20.

Lord Parker C.J., Ashworth and Elwes JJ.

REGINA *v.* STAINCROSS JUSTICES. *Ex parte* TEASDALE.

Poison—Sale of—Exemption—Sale of medicine by employee of pharmaceutical chemist—Employee not a registered pharmacist—Employer charged with unlawful sale of medicine otherwise than under direct and personal supervision of a registered pharmacist—Whether failure to comply with "provisions" of Act—Whether "medicine" medicine containing poison—Whether charge properly laid—Pharmacy and Poisons Act, 1933 (23 & 24 *Geo.* 5, *c.* 25), *ss.* 18 (1), 19 (1) (5), 24 (1) (2).

The applicant, a pharmaceutical chemist, pleaded guilty and was fined and convicted on an information alleging that he, being an authorised seller of poisons, did unlawfully dispense a certain medicine otherwise than under the direct personal supervision of a registered pharmacist contrary to sections 19 (5) and 24 of the Pharmacy and Poisons Act, 1933.[1] The applicant was in fact an

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[1] Pharmacy and Poisons Act, 1933, s. 18: "(1) Subject to the provisions "of this Part of this Act, it shall not "be lawful—(*a*) for a person to sell "any poison included in Part I of "the Poisons List, unless (i) he is "an authorised seller of poisons; and "(ii) the sale is effected on premises "duly registered under Part I of this "Act; and (iii) the sale is effected "by, or under the supervision of, a "registered pharmacist . . ."

S. 19: "(1) Nothing in the last "foregoing section shall apply . . . "(*b*) to a medicine which is dispensed "by an authorised seller of poisons "on premises duly registered under "Part I of this Act; or (*c*) to a "poison forming part of the ingredients of a medicine which is "supplied by an authorised seller of "poisons on premises duly registered "under Part I of this Act, if the requirements contained in the following provisions of this section are "satisfied in relation thereto. . . . (5) "In the case of a medicine which is "supplied or dispensed by a person "who is an authorised seller of "poisons, the supplying or dispensing "of the medicine must be effected by or "under the direct and personal supervision of a registered pharmacist."

S. 24: "(1) A person who acts "in contravention of or fails to comply with any of the provisions of "Part II of this Act . . . shall, on "summary conviction, be liable in "respect of each offence to a fine . . . "(2) In the case of proceedings authorised seller of poisons but in his absence an employee for whose actions he was responsible, contrary to his instructions, had sold the medicine without the supervision of a registered pharmacist, thereby failing to comply with the provisions of section 19 (5).

On an application for an order of certiorari to quash the conviction on the ground that the charge was wrongly laid and the conviction disclosed no offence in law:—

Held, that "medicine" in section 19 of the Act of 1933 meant medicine which contained poison, and that section provided exemption from the substantive provisions of section 18; that the failure to comply with "any of the provisions of Part II of this Act" contemplated by section 24 (1) was a failure to comply with some substantive provision, and not with provisions affording an exemption, and that, therefore, the applicant, who should have been charged under section 18, was wrongly charged and the conviction must be quashed.

APPLICATION for an order of certiorari.

The following facts appeared from the affidavit filed in support of the motion. An information was preferred by the respondent, a superintendent of police, against the applicant, Cyril Teasdale, a pharmaceutical chemist carrying on business at High Street, Wombwell, Yorkshire, alleging that on October 1, 1959, he, being an authorised seller of poisons, unlawfully dispensed a medicine, urolucosil tablets, otherwise than under the direct personal supervision of a registered pharmacist, contrary to sections 19 (5) and 24 of the Pharmacy and Poisons Act, 1933. The information was heard on November 30, 1959, by Staincross justices, sitting at Barnsley. The facts alleged in the information were correct in that (1) the applicant was an authorised seller of poisons; (2) on October 1, 1959, an employee of his who was not a registered pharmacist did, contrary to the applicant's express instructions, dispense in his absence some urolucosil tablets; and (3) by virtue of section 24 (2) of the Act of 1933 it would have been no defence to any offence charged under the Act that the employee had acted without his authority. The applicant pleaded guilty to the information and was fined £50.

The applicant, having been advised subsequently, and submitting, that section 19 (5) of the Act did not create any offence, and that the information and conviction were bad in law, now sought an order of certiorari to bring up and quash the conviction on the ground that it disclosed no offence in law.

"against a person under this section "for or in connection with the sale, "exposure for sale or supply of a "poison effected by an employee (*a*) it "shall not be a defence that the "employee acted without the authority "of the employer . . ."

Rodney Bax for the applicant. Section 19 (5) of the Pharmacy and Poisons Act, 1933, creates no offence and, therefore, the charge was wrongly laid and the conviction and fine are bad in law. Section 18 creates certain offences in relation to the sale of poisons and the charge in this case should have been laid under section 18. Section 19 provides exemption from the requirements of section 18 provided that certain conditions are complied with; that is, there is no offence, and it is a defence to a charge under section 18 if the requirements of section 19 are complied with. The general reference to "acts in contravention "of or fails to comply with any of the provisions of Part II of "this Act" in section 24 (1) means a contravention of or failure to comply with some positive requirement of Part II of the Act breach of which is an offence, and not with a provision for obtaining exemption from such a requirement.

[LORD PARKER C.J. referred to *Tonkin* v. *Raven*.[2]]

Alternatively, the charge here was of selling a medicine, urolucosil tablets, but there was no allegation that it contained a poison included in Part I of the Poisons List. The poison should have been named, and the conviction on its face discloses no offence.

This application, therefore, should be allowed and the conviction quashed.

R. A. R. Stroyan for the respondent. The charge was properly laid under section 19 (5) of the Act of 1933. Even if section 19 provides exemption from section 18, its requirements are nevertheless "provisions" which have to be complied with. Subsection (5) contains the imperative "must," and failure to do what "must" be done is a contravention. A person who fails to comply with the requirements of section 19 (5), therefore, "acts in contravention of or fails to comply with" a provision or "provisions" of Part II of the Act within section 24 (1) and is guilty of an offence. The fact that the applicant might also have been charged and incurred a penalty under section 18 is no bar to his incurring a penalty under another section.

Section 19 does not merely provide exemption from the provisions of section 18. It lays down a separate code governing the dispensing of medicines and doctors' prescriptions rather less stringent than that in section 18 relating to poisons. A medicine does not necessarily contain poison and, if it does not, it does not come under section 18. But a medicine containing even a very small quantity of poison would come under section 18, and it is for that reason that section 19 opens with the words " Nothing " in the last foregoing section shall apply." [Reference was made to *Roberts* v. *Littlewood's Mail Order Stores Ltd.*[3]]

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[2] [1959] 1 Q.B. 177; [1958] 3 W.L.R. 643; [1958] 3 All E.R. 374, D.C.

By reason of his plea of guilty the applicant is precluded from raising the point that the poison should have been named in the charge.

Bax in reply. Section 19 does not provide a separate code for medicines, but relates to poisons. The effect of the argument for the respondent would be that, if a registered pharmacist who was not an authorised seller of poisons (see section 8) dispensed a harmless medicine, no offence would have been committed; whereas an authorised seller of poisons would in similar circumstances be guilty of an offence. The opening words of section 19 mean what they say: that the section is to provide exemptions from the provisions of section 18 in the case of medicines containing poisons included in Part I of the Poisons List.

LORD PARKER C.J. In these proceedings Mr. Bax moves on behalf of the applicant, Cyril Teasdale, a pharmaceutical chemist, for an order of certiorari to bring up and quash a conviction of the applicant by justices for the Petty Sessional Division of Staincross, dated November 30, 1959, for an offence contrary to section 19 (5) and section 24 of the Pharmacy and Poisons Act, 1933.

The short point here, and it is a highly technical one, is whether the applicant was properly charged. The applicant, in fact, acting on advice, pleaded guilty, but he has since received other advice, and if that later advice is right, the justices had no jurisdiction in the matter because the charge was wrongly laid.

The relevant provisions of the Pharmacy and Poisons Act, 1933, are to be found in Part II of the Act. So far as it is material, section 18 provides: " (1) Subject to the provisions of this " Part of this Act, it shall not be lawful—(*a*) for a person to sell " any poison included in Part I of the Poisons List, unless (i) he " is an authorised seller of poisons; and (ii) the sale is effected on " premises duly registered under Part I of this Act; and (iii) the " sale is effected by, or under the supervision of, a registered " pharmacist." Pausing there, the applicant was an authorised seller of poisons, but an employee for whose actions he was responsible had without his instructions and without the

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[3] [1943] K.B. 269; 59 T.L.R. 158; [1943] 1 All E.R. 271, D.C.

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supervision of a registered pharmacist sold some urolucosil tablets. Section 19, which has the sidenote: "Exemption with "respect to medicines," begins in this way: "(1) Nothing in the "last foregoing section shall apply . . . "—amongst other things —"(*b*) to a medicine which is dispensed by an authorised seller "of poisons on premises duly registered under Part I of this Act; "or (*c*) to a poison forming part of the ingredients of a medicine "which is supplied by an authorised seller of poisons on premises "duly registered under Part I of this Act, if the requirements "contained in the following provisions of this section are satisfied "in relation thereto." Then there follow a number of requirements, for instance, that "(2) The medicine must be distinctly "labelled with the name and address of the person by whom it is "supplied or dispensed," and by subsection (3) that entries be made of "(*a*) the date on which the medicine was supplied or "dispensed; (*b*) the ingredients of the medicine and the quantity "thereof supplied," and matters of that sort. Finally, by subsection (5) it is provided: "In the case of a medicine which is "supplied or dispensed by a person who is an authorised seller of "poisons, the supplying or dispensing of the medicine must be "effected by or under the direct and personal supervision of a "registered pharmacist." Lastly, it is to be observed that section 24, which is dealing with penalties, provides in subsection (1): "A person who acts in contravention of or fails to "comply with any of the provisions of Part II of this Act (other "than subsection (8) of section twenty-one), or any rules made "under this Part of this Act shall, on summary conviction, be "liable," and so on.

What is said here on behalf of the applicant is that the only section which creates a substantive offence is section 18, and that, accordingly, he was wrongly charged. Section 18 prohibits the sale of any poison except under certain circumstances, and it is contended that section 19 is not in itself creating any substantive offence but is, as the sidenote says, merely an exemption, and, accordingly, it is a defence if somebody can say: "Notwithstanding that I appear to have committed an "offence under section 18, I am not guilty because I come within "section 19 and I have complied with the provisions there set "out." It is said, on the other hand, that section 19 is dealing with quite a separate matter, namely, medicines, whether containing poisons or not, and is setting out a code dealing with the supply and dispensing of medicines, and that failure to comply with the provisions of that code is a failure to comply with one of the provisions of Part II of the Act within section 24, the penalty clause. I am satisfied that section 19 is an exemption from section 18, and that when medicine is referred to in section 19 it is medicine which contains a poison. That must be so. This is a group of sections in Part II of the Act dealing with poisons. If section 19 had been intended to provide a separate code dealing with medicines, whether poisonous or not, it is to my mind extraordinary that it should begin with the words: "Nothing in the last foregoing section shall apply," and so on. It seems to me that section 19 is an exemption clause, and an exemption which only operates if certain conditions are fulfilled. Then it said that even so those conditions have to be complied with, and that, therefore, if they are not, there is a failure to comply within section 24, and an offence is committed. For my part, I feel that a failure to comply with the provisions in section 19 cannot amount to an offence under section 24. The words "fails to comply with any of the provisions of Part II of this Act" in section 24 must mean a failure to comply with some substantive provision of Part II and not, as is said in this case, with something which is a requirement if exemption is to be obtained. It would be stretching the meaning of those words to say that provisions which afford an exemption are provisions which have to be complied with and, for those reasons, I have come to the conclusion that the applicant was wrongly charged. He should have been charged under section 18. Under section 18 he would, as I conceive it, have had no defence because he would not have been able to bring himself within section 19, not having complied with its provisions. This is a highly technical matter; there are no merits so far as I can see in the application but, for the reasons which I have endeavoured to state, I think that the applicant was wrongly charged and that his conviction must be quashed.

ASHWORTH J. I agree.

ELWES J. I agree.

Application allowed.

Solicitors: *Lamartine, Yates & Lacey; R. C. Linney, Wakefield.*

J. F. L.

C. A.

1960
Jan. 28, 29;
March 14.

Ormerod and Devlin L.JJ., Donovan J.

JONES *v.* CHALLENGER.

Trust for Sale—Power to postpone—Matrimonial home—Husband and wife joint tenants—Divorce—Wife's application for order directing sale—Court's discretion—Law of Property Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *s.* 30.

Husband and Wife—Property—Matrimonial home—Divorce—Husband and wife joint tenants—Wife's right to enforce trust for sale—Law of Property Act, 1925, *s.* 30.

In 1956, a husband and wife purchased a lease, with about 10 years to run, of a house which they then occupied as the matrimonial home, the purchase-money being provided by the parties equally. The lease was assigned to them as trustees to sell the same with power to postpone the sale upon trust for themselves as joint tenants. In February, 1959, the husband obtained a divorce from the wife on the ground of her adultery. After the decree the wife, who had left the house, remarried, while the husband continued to live there and refused to agree to the sale of the lease. The wife then applied to the county court for an order under section 30 of the Law of Property, 1925,[1] that as co-trustee with her the husband should concur in offering the house for sale. The county court judge held that in exercising his discretion under section 30, it would not be reasonable to order a sale so as to turn the husband out of his house. On appeal:—

Held (*per* Ormerod and Devlin L.JJ.), (1) that when property was acquired by husband and wife jointly for the purpose of providing a matrimonial home, neither party had a right to demand the sale of the property while that purpose still existed, for that might defeat the object behind the trust; but with the end of the marriage that purpose was dissolved and the duty to sell was restored; it was then for the court to look at all the circumstances and consider, not whether it was reasonable for the husband to continue to live in the house, or for the wife to receive her share of the trust property in cash, but whether it was inequitable for the wife, once the matrimonial home had gone, to want to realise her investment (post, pp. 180, 182, 184).

(2) That there was no way in which the court's discretion could be exercised except by an order to sell because the conversion of the property into a form in which both parties could enjoy their rights equally was the prime object of the trust (post, pp. 183, 184).

In re Mayo [1943] Ch. 302; 59 T.L.R. 395; [1943] 2 All E.R. 440; *In re Buchanan-Wollaston's Conveyance* [1939] Ch. 738; 55 T.L.R. 604; [1939] 2 All E.R. 302; *In re Hyde's Conveyance* (1952)

[Reported by A. H. Bray, Esq., Barrister-at-Law.]

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[1] Law of Property Act, 1925, s. 30: "If the trustees for sale refuse "to sell . . . any person interested "may apply to the court . . . for an "order directing the trustees for sale "to give effect thereto, and the court "may make such order as it thinks "fit."

102 L.J. 58; *Stevens* v. *Hutchinson* [1953] Ch. 299; [1953] 2 W.L.R. 545; [1953] 1 All E.R. 699; *Bull* v. *Bull* [1955] 1 Q.B. 234; [1955] 2 W.L.R. 78; [1955] 1 All E.R. 253, C.A. applied.

Cobb v. *Cobb* [1955] 1 W.L.R. 731; [1955] 2 All E.R. 696 distinguished.

Per Donovan J. The language of section 30 conferred a complete discretion on the court, and the county court judge did not commit any error of law which vitiated the manner in which he exercised his discretion; but justice required that, if the husband wished to continue to live in the house, the wife should be paid the value of her interest therein, whereupon she should cede her share of the joint tenancy to him (post, pp. 185, 187).

APPEAL from Judge Temple Morris sitting at Bargoed County Court.

The applicant, Mrs. Margaret Jane Jones, and the respondent, Leonard Godfrey Challenger, were formerly husband and wife and, on March 7, 1956, while they were still married, they purchased for £375 the lease of No. 10, Bailey Street, Deri, Bargoed, Glamorgan. At the time of the purchase, the lease had about 10 years to run. The assignment of the lease was granted to the purchasers as trustees to sell the same with power to postpone the sale thereof upon trust for themselves as joint tenants. The money which went to buy the lease was provided by the parties equally and they were, accordingly, beneficiaries in equal shares.

Shortly after the purchase of the lease, the marriage broke up and in 1957 the husband filed a petition for divorce on the ground of the wife's adultery and cruelty. A decree nisi was given to the husband on the ground of the wife's adultery, and on February 9, 1959, the decree was made absolute. In March, 1959, the wife, who had left No. 10, Bailey Street, remarried. She did not want to live in No. 10, Bailey Street, but wanted her share of its value in cash. The husband did not want to sell. He had throughout continued to live in the premises and wished to continue to do so. He regarded it as his house and did not wish to go into lodgings. There was some prospect that he might marry again, but it was quite indefinite, the woman in question being married and no proceedings having been instituted.

On May 13, 1959, the wife applied in the Bargoed County Court for an order under section 30 of the Law of Property Act, 1925, that the husband as co-trustee with her of the premises should concur with her in offering the property for sale, or alternatively, that the property should be sold by order of the court. On August 5, 1959, her application was dismissed. The wife appealed.

Hywel ap Robert for the wife. The husband and wife hold the house as trustees for sale and the effect of the county court judge's findings is that they are jointly beneficially entitled to the proceeds of sale. The wife was compelled to apply for an order under section 30 of the Law of Property Act, 1925. *In re Mayo*[2] shows that in the absence of any mala fides the trust for sale must prevail unless all the trustees are agreed in exercising the power to postpone the sale. See also *In re Ball*,[3] from which it is clear that where the capital of the trust estate becomes divisible, the power to postpone sale ceases. In *In re Buchanan-Wollaston's Conveyance*[4] and in *In re Hyde's Conveyance*[5] the discretion under section 30 of the Law of Property Act, 1925, was not exercised in favour of ordering a sale, but in both those cases there was something akin to mala fides. If in *Bull* v. *Bull*[6] application had been made to the court under section 30, the court would have ordered sale if it was right and proper for such an order to be made. *Cobb* v. *Cobb*[7] was a case under section 17 of the Married Women's Property Act, 1882, the marriage was still subsisting and both parties were living in the house.

Even if the county court judge was entitled to consider the matrimonial rights and wrongs of the parties, he should not have cut off the wife from her rights in the house. But in fact the judge took into consideration something which he should not have done—the fact that she had committed adultery. Moreover, he failed to take into account the fact that the wife had a beneficial half interest in the house.

[Donovan J. He could only do this by depriving the husband of his beneficial half interest in the form in which he wanted to enjoy it.]

[Ormerod L.J. Surely there is a discretion in the court. What are the limits of the court's discretion?]

It is a discretion as to the form in which property rights are to be enjoyed; not a discretion to vary or extinguish such rights.

Section 30 was enacted in this form to safeguard the rights of beneficiaries under the trust. The wife may see this lease expiring without getting any benefit from it. It is a wasting asset and the judge was wrong in finding that the wife's half share in the house was quite safe. It is the duty of a trustee to preserve the trust property and the husband is not performing that duty. Either a sale should have been ordered or as a condition of the court not ordering a sale, the husband should have been put on terms as to his occupation of the house. Assuming that there is a discretion, the effect of his exercise of it by the county court judge was to deprive the wife of her beneficial interest; he was wrong in saying that the wife's interest was not prejudiced.

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[2] [1943] Ch. 302; 59 T.L.R. 395; [1943] 2 All E.R. 440.

[3] [1930] W.N. 111.

[4] [1939] Ch. 738; 55 T.L.R. 604; [1939] 2 All E.R. 302.

[5] (1952) 102 L.J. 58.

[6] [1955] 1 Q.B. 234; [1955] 2 W.L.R. 78; [1955] 1 All E.R. 253, C.A.

[7] [1955] 1 W.L.R. 731; [1955] 2 All E.R. 696.

Phillip Wien for the husband. The county court judge had a discretion under section 30 which he exercised judicially, taking into account all relevant circumstances. As to the principles upon which the discretion under section 30 should be exercised, see *In re Buchanan-Wollaston's Conveyance*,[8] which shows that the order for sale should only be made if it is right and proper so to do. After considering all the circumstances, the judge did not consider it reasonable to order a sale. In *Stevens* v. *Hutchinson* [9] Upjohn J. would clearly have exercised his discretion in favour of postponing sale if it had been the husband and not his judgment creditor who had applied for an order. No order for sale was made in *In re Hyde's Conveyance*.[10] It would be most hard on the husband if an order for sale were made, for it would have the effect of compelling him, the innocent party, to leave the house which both parties had chosen as the matrimonial home. The county court judge did not misdirect himself.

Cur. adv. vult.

March 14. ORMEROD L.J. I have had an opportunity of reading the judgment about to be delivered by Devlin L.J. in this case. I am in full agreement with it, and there is nothing I can usefully add.

DEVLIN L.J. read the following judgment, in which he stated the facts, referred to section 30 of the Law of Property Act, 1925, and continued: The county court judge reviewed the cases in which this section has been considered, and came to the conclusion that he had a complete discretion to do what was reasonable in the circumstances. He said: "I think it would "not be reasonable to order a sale at this moment; the effect "would probably be to put the respondent out. He is there alone, "he has nowhere to go. He is in his own home. His half-share "is in it. The applicant's half-share is quite safe in it. All the

[8] [1939] Ch. 738.

[9] [1953] Ch. 299; [1953] 2 W.L.R. 545; [1953] 1 All E.R. 699.

[10] 102 L.J. 58.

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"circumstances must be examined; the applicant has chosen her "new life, and is living in her new home with her husband. It "may well be in the future, possibly the very near future, the "situation will change, but at this moment I think this application is premature. Today, I think the attitude of the respondent "is reasonable."

I do not think that on any view the application can properly be described as premature. The marriage broke up three years ago, and applications to divide up the property of a husband and wife are frequently made under the Married Women's Property Act, 1882, s. 17, while the marriage is still alive. This marriage is irretrievably finished, and the application was not made until two months after the decree absolute had been pronounced. I think that the wife is entitled to know where she stands. Apart from the uncertain prospect of the husband's remarriage, there is no likelihood that the circumstances will change. If circumstances do not change, the effect of the judge's order must be that the husband can continue to use the house as his home for so long as he wants or until the lease expires. The value of the leasehold must be diminishing, and, if the lease runs its course, the wife may lose all the money she put into it.

There does not appear to be any case in which an order under section 30 has been made where the trust property consists of what was formerly the matrimonial home. The county court judge had no clear authority to guide him in arriving at his decision, and neither have we. After careful consideration of the authorities and some hesitation, I have come to the conclusion that the judge applied the wrong test, and that the question is not whether it is reasonable or unreasonable that the husband should be allowed to remain in the house.

At the front of his argument on behalf of the wife Mr. ap Robert put *In re Mayo*.[1] In this case Simonds J. said[2]: "The "trust for sale will prevail, unless all three trustees agree in "exercising the power to postpone." If that dictum governs this case, Mr. ap Robert must succeed. But he felt a difficulty in pushing his argument to this extent because of what was said by Lord Greene M.R. in *In re Buchanan-Wollaston's Conveyance*,[3] where he laid down the principle more widely, and said[4] that the court must ask itself "whether or not the person applying

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[1] [1943] Ch. 302; 59 T.L.R. 395; [1943] 2 All E.R. 440.

[2] [1943] Ch. 302, 304.

[3] [1939] Ch. 738; 55 T.L.R. 604; [1939] 2 All E.R. 302.

[4] [1939] Ch. 738, 747.

"for execution of the trust for sale is a person whose voice should "be allowed to prevail."

The apparent difference between these two dicta is, I think, explained when the different facts in the two cases are considered. *In re Mayo* [5] was a simple uncomplicated case of a trust for sale of freehold property, where the beneficiaries were brother and sister, and where there was no suggestion that either of them were intended to or even wished to occupy the property. Simonds J. was applying the simple and fundamental principle that in a trust for sale there is a duty to sell and a power to postpone; and, accordingly, one trustee may call upon the others to perform the duty, but all must be agreed if they are to exercise the power.

But this simple principle cannot prevail where the trust itself or the circumstances in which it was made show that there was a secondary or collateral object besides that of sale. Simonds J., in his judgment in *In re Mayo*,[6] said that if there were mala fides, the position would be different. If it be not mala fides, it is at any rate wrong and inequitable for one of the parties to the trust to invoke the letter of the trust in order to defeat one of its purposes, whether that purpose be written or unwritten, and the court will not permit it. In *In re Buchanan-Wollaston's Conveyance* [7] four owners, who each had separate but neighbouring properties, combined to buy a piece of land which they desired to keep as an open space. The land was conveyed to them as joint tenants and consequently a statutory trust for sale came into existence by virtue of section 35 of the Law of Property Act, 1925. The parties then entered into a covenant in which they agreed in effect to preserve the land as an open space. One of the parties subsequently sold his property and then applied against the opposition of the others to have the piece of land sold. The application was refused and it is plain from the judgment that in such circumstances the court has a complete discretion to do what is right and proper, and will not allow the voice of the man who is in breach of his obligation to prevail.

Three other cases were cited as supporting this wider principle. In *In re Hyde's Conveyance* [8] two brothers jointly purchased property for occupation by a company in which they were both interested, and for the erection of a factory thereon. Subsequently they quarrelled and one brother applied for an order under section 30 for the sale of the property. The company was still a going concern and the applicant had abandoned a petition for its winding up; he had also refused an offer from the other brother based on the full market value of the property as settled by an independent valuer. The application was refused. Danckwerts J. appears to have been satisfied that the applicant was acting out of spite, and said that he was endeavouring to use the trust for sale to defeat the purpose for which the land had been acquired.

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[5] [1943] Ch. 302.

[6] Ibid.

[7] [1939] Ch. 738.

[8] (1952) 102 L.J. 58.

In *Stevens* v. *Hutchinson*[9] a husband and wife held property, which was in fact the matrimonial home, on trust for sale as tenants in common in equal shares. A judgment creditor of the husband applied for an order under section 30, which was refused by Upjohn J. on the ground that the creditor was not a person interested. But the judge went on to say that the creditor could, in any event, have no better right than the husband, and that the husband could not have obtained an order which would have turned the wife out of the matrimonial home. This means, as Mr. Wien rightly submits, that the judge would clearly have exercised a discretion in favour of postponing the sale. The case shows, I think, that where property is acquired by husband and wife for the purpose of providing a matrimonial home, neither party has a right to demand the sale while that purpose still exists; that might defeat the object behind the trust, and the court must do what is right and proper in all the circumstances. The case is no authority for the view that the same wide discretion exists when the house is no longer the matrimonial home and the purpose has failed.

Bull v. *Bull*[10] is a case in which the joint occupation was not matrimonial. The house was owned jointly by a mother and son but the son had provided the greater part of the purchase price. The son gave his mother notice to quit, but this court held that as a tenant in common she could not be ejected. Denning L.J. said that the son could apply under section 30, and the court, in order that there might be a sale with vacant possession, could turn the mother out if it was right and proper to do so. I think that this dictum must be considered on the footing that the house was bought for the purpose of providing a home for mother and son and that, as the mother was still residing there, that purpose had not been brought to an end.

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[9] [1953] Ch. 299; [1953] 2 W.L.R. 545; [1953] 1 All E.R. 699.

[10] [1955] 1 Q.B. 234; [1955] 2 W.L.R. 78; [1955] 1 All E.R. 253.

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In each of these four cases, *In re Buchanan-Wollaston's Conveyance*,[11] *In re Hyde's Conveyance*,[12] *Stevens* v. *Hutchinson*[13] and *Bull* v. *Bull*,[14] there was a trust for sale because there was a joint tenancy, and the joint tenancy had been created for a particular purpose. In the first case this purpose was expressed, and in the other three cases the object of the joint tenancy was clear from the circumstances in which it was created. I see no inconsistency between these four cases and *In re Mayo*,[15] in which no collateral purpose was manifest. There is, as I have said, something akin to mala fides if one trustee tries to defeat a collateral object in the trust by arbitrarily insisting on the duty of sale. He should have good grounds for doing so and, therefore, the court will inquire whether, in all the circumstances, it is right and proper to order the sale.

In the case we have to consider, the house was acquired as the matrimonial home. That was the purpose of the joint tenancy and, for so long as that purpose was still alive, I think that the right test to be applied would be that in *In re Buchanan-Wollaston's Conveyance*.[16] But with the end of the marriage, that purpose was dissolved and the primacy of the duty to sell was restored. No doubt there is still a discretion. If the husband wanted time to obtain alternative accommodation, the sale could be postponed for that purpose, but he has not asked for that. If he was prepared to buy out the wife's interest, it might be proper to allow it, but he has not accepted a suggestion that terms of that sort should be made. In these circumstances, there is no way in which the discretion can properly be exercised except by an order to sell, because, since they cannot now both enjoy occupation of the property, that is the only way whereby the beneficiaries can derive equal benefit from their investment, which is the primary object of the trust.

It is said that it is hard on the husband that he should have to give up the house which it was his wife's choice and not his to abandon. So it is. But wherever there is a joint occupation, whether it is matrimonial or otherwise, and it is brought to an end, it may involve hardship and inconvenience on the person who would have preferred it to go on. If the wife had died and left her share under the trust to a stranger, I think that the house would obviously have had to be sold. The position is the same if the marriage is ended by divorce, for the court is not under

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[11] [1939] Ch. 738.
[12] 102 L.J. 58.
[13] [1953] Ch. 299.
[14] [1955] 1 Q.B. 234.
[15] [1943] Ch. 302.
[16] [1939] Ch. 738.

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section 30 concerned with the reasons for the ending of the marriage or the rights and wrongs of it; it can only take note that the object of the trust, so far as it required the preservation of the realty, has been fulfilled.

I think that the result must be the same whether the test to be applied is derived from the language used in *In re Mayo*[17] or from that used in *In re Buchanan-Wollaston's Conveyance*.[18] Let it be granted that the court must look into all the circumstances; if when the examination is complete, it finds that there is no inequity in selling the property, then it must be sold. The test is not what is reasonable. It is reasonable for the husband to want to go on living in the house, and reasonable for the wife to want her share of the trust property in cash. The true question is whether it is inequitable for the wife, once the matrimonial home has gone, to want to realise her investment. Nothing said in the cases which I have cited can be used to suggest that it is, and, in my judgment, it clearly is not. The conversion of the property into a form in which both parties can enjoy their rights equally is the prime object of the trust; the preservation of the house as a home for one of them singly is not an object at all. If the true object of the trust is made paramount, as it should be, there is only one order that can be made.

It is, I think, desirable to distinguish the position that may arise when an application is made under the Married Women's Property Act, 1882, s. 17, because we were referred to *Cobb* v. *Cobb*,[19] a case decided under that Act. It was a case in which a husband and wife owned a house in equal shares. Matrimonial proceedings were begun but both parties continued to live in the house. The husband applied under section 17 for an order for the sale of the house, which this court refused. The house was still the matrimonial home and the court had a complete discretion. The judgment of Denning L.J.[20] shows that the question of sale can be dealt with somewhat differently in applications under that section, the marriage being still alive. If the court thinks it proper to give one party or the other the right to reside in the house after the marriage is over, it is not then necessarily interfering with the equal division of property held in equal shares. If there is other property to be divided, an overall equality may be reached; or if there is not, the necessary adjustment may be made on the settlement of alimony or maintenance. So long as in the end the division is in the correct proportion, each party gets his or her rights, and the question of whether one party shall have the enjoyment of one particular piece of property, such as the house, can properly be decided simply by what seems best to the court and most reasonable. But this can only be done as part of matrimonial proceedings. The order made in this case is tantamount to requiring the wife to contribute towards the upkeep of the husband's home, and it is too late for that now.

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[17] [1943] Ch. 302.
[18] [1939] Ch. 738.
[19] [1955] 1 W.L.R. 731; [1955] 2 All E.R. 696.
[20] [1955] 1 W.L.R. 734.

For these reasons, I think that the appeal should be allowed, and that an order should be made in the terms set out in the application.

Donovan J. (read by Ormerod L.J.). I need not repeat the history of the case leading up to the application to the county court judge for an order under section 30 of the Law of Property Act, 1925, that the trust for sale should be enforced. That trust was contained in the assignment of the lease to the wife and the husband, and was expressed as follows: "The purchasers "[i.e., the wife and husband] shall hold the property upon trust "to sell the same with power to postpone the sale thereof, and "shall hold the net proceeds of sale and other money applicable "as capital, and the net rents and profits thereof until sale upon "trust for themselves as joint tenants."

The language of section 30 could hardly be more apt to confer a complete discretion on the court which considers an application under the section. The court is, inter alia, to make "such order "as it thinks fit." The discretion must, of course, be exercised judicially, and the principles which govern its exercise are those set forth in this court in *In re Buchanan-Wollaston's Conveyance*.[21] Lord Greene M.R. there said[22]: "It seems to me that "the court of equity, when asked to enforce the trust for sale, "whether one created by a settlement or a will or one created by "the statute, must look into all the circumstances of the case "and consider whether or not, at the particular moment and in "the particular circumstances when the application is made to it, "it is right and proper that such an order shall be made."

This is what the county court judge did in the present case. Accordingly, if his conclusion is to be reversed or varied, it must be shown that he misdirected himself in law, or misunderstood or ignored some important relevant fact, or omitted to deal with the application in its entirety.

[21] [1939] Ch. 738.

[22] Ibid. 747.

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Counsel for the wife quoted one phrase used by the judge in support of a contention that he misdirected himself upon a crucial matter. He said, among other things: "The applicant's half-"share is quite safe." In its context that seems to me to mean no more than this, namely, that the husband could not alienate the wife's share of the joint tenancy without her knowledge or consent; and as a proposition of law that is correct. The phrase cannot mean (as the wife contended) that the judge had forgotten that the joint tenancy was of a wasting asset, because only a moment or two before he had said so in his judgment.

Nor do I think that the judge made the reasonableness of the husband's attitude the touchstone of his decision not to order a sale. He had to consider all the circumstances and the reasonableness of the attitude of both parties were among the circumstances to be taken into account. The judge did say: "I "think it would not be reasonable to order a sale at this "moment," and he says this immediately after referring to *In re Buchanan-Wollaston's Conveyance*,[23] where he says: "a sale "was not ordered because it would have been unreasonable." The expression actually used in the case cited was "right and "proper": but the judge was here clearly using the word "reasonable" merely as a synonym for "right and proper," because he also says in his judgment: "I can only make an order "for sale if satisfied that it is," (and these are the important words) "right and proper to do so."

It seems to me, therefore, that the judge did address his mind to the right question.

The reference to the application being premature was no more than another way of saying that at the moment the judge thought it would not be right and proper to order a sale, leaving the way open for a renewed application should the circumstances of either party change. This seems to be a reference to the husband's contemplated remarriage, and if another woman were let into the enjoyment of the wife's property rights this might well be regarded as a circumstance calling for a different decision. But whether it would or would not, cannot alter the existing circumstances, and it was upon those that the judge reached his decision. They included the following: The wife had another house of her own where she was living with her new husband; the husband was still living in the disputed house which he had originally bought jointly with the wife as a home, which purpose, so far as he was concerned, was continuing. It was true that the wife was obtaining no benefit from the house, but the benefit she had originally contemplated, namely, the right to live in the house, was one which she herself had voluntarily abandoned.

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[23] [1939] Ch. 738.

The question now before the court on this part of the case is not whether it would have reached the same conclusion itself; but whether the county court judge committed some error of law which vitiates the manner in which he exercised his discretion. In my view there is no evidence of any such error. The fact which looms so large in this case, namely, that the property is a wasting asset, is, of course, of great importance; but unless there is to be a rule that in all such cases a sale must be ordered, it remains a matter of discretion.

We were, however, told at the Bar that as an alternative it was argued before the judge that if he refused to order the sale of the house, at least he ought to put the husband upon terms as a condition of his continuing to occupy it.

In his judgment the county court judge does not deal with this claim at all, and does not purport to exercise any discretion whatever in respect of it. This court must, therefore, do so.

It is clear that the wife does not want the house to be sold merely for the sake of a sale; nor, so far as the evidence discloses, does she want to turn the husband out of the house for the mere sake of doing so. She made her wish quite plain during the course of her evidence when she said: "Give me my half and he "can do what he likes with the rest."

In the circumstances, the question is whether a proper exercise of discretion under section 30 requires that the wife should be paid something now by the husband in respect of her half-share. The facts that bear upon this problem are, first, that the wife provided half the money for the purchase of the house; secondly, that it is a wasting asset getting less in value year by year and, perhaps, even month by month; and, thirdly, that even if the wife broke up the marriage, it is no reason by itself for depriving her altogether of her property rights, whether temporarily or otherwise.

I think that justice requires that the wife should be paid the value of her interest in the property if the husband wishes to continue to live there, and that the wife should thereupon cede her share of the joint tenancy to the husband. To this end I think the house should be independently valued as at the date when the wife lodged her application under section 30 in the county court, and that the husband should pay the wife the amount of the value

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so found. If, of course, the parties can agree the value in default of a valuation, so much the better. We have not seen the head lease, and it may be that there is liability for dilapidations under it when the lease runs out. It would, no doubt, be proper to take account in the valuation of the wife's share of the liability for such dilapidation up to the date when she left the house and went to live elsewhere.

The result of disposing of the matter in this way will be to give the parties what they really want: the wife the money value of her interest; and the husband, the right to continue to live in the house without all the disturbance and hazards of a forced sale.

I would therefore allow the appeal to the extent necessary to make such an order.

Appeal allowed in terms of judgment of Devlin L.J., with costs in Court of Appeal and below.

Solicitors: *Parlett, Kent & Co. for Norman Morgan & Davies, Cardiff; W. H. Williams, Caerphilly.*

1960
June 28, 29.

Diplock J.

GAGE AND ANOTHER *v.* KING.

[1959 G. No. 1220.]

Damages—Remoteness of damage—Expenses of third party—Expenses incurred as result of injuries to wife—Payment by husband out of joint bank account—No agreement between husband and wife as to ownership of credit balance—Whether husband under legal obligation to pay—Whether special damage recoverable by wife.

Husband and Wife—Property—Act of 1882, *s.* 17*—Joint bank account—Discretion of court—No contractual rights during subsistence of marriage.*

Husband and Wife—Agency—Medical treatment for wife—Husband's liability—Inability of wife to recover expenses as special damage for personal injuries.

Banking—Husband and wife—Joint account—Rights of spouses during subsistence of marriage.

A husband and wife sustained injuries when their motor-car, driven by the husband, was in collision with a motor-car driven by the defendant. Both husband and wife sued the defendant for damages and the husband was found to be two-thirds and the defendant one-third to blame for the collision. Included in the claim for special damage were certain expenses, doctors' and nursing home fees and additional domestic help, incurred as a result of the injuries to the wife. The majority of those expenses had been paid by the husband out of a joint bank account fed by income from the husband's investments and business and interest on the wife's investments. Both spouses drew on the account for housekeeping and personal expenses but there was no evidence of any agreement between them as to the ownership of any balance standing to the credit of the account. Some of the doctors' fees were still unpaid and most of the fee notes bore the name of the wife.

On a claim that, since they had been paid out of the joint account, the expenses incurred as a result of the wife's injuries were special damage which she was entitled to recover in full against the defendant:—

Held, (1) that the mutual rights of a husband and wife in the balance in a joint account while a marriage was still subsisting were not necessarily the same as their rights on the break up of the marriage, for such an arrangement was not meant to be attended with legal consequences as between the two spouses during the subsistence of the marriage, and that, since the right of the wife to draw on the account was subject to no limitation and was neither increased nor diminished by the fact that the husband had drawn on it for the expenses incurred by reason of her injuries, any more than it would have been had the expenses been incurred in respect of the injuries sustained by him, the fact that the monies paid by the husband for the wife's injuries were paid out of a joint account was irrelevant.

Dictum of Atkin L.J. in *Balfour* v. *Balfour* [1919] 2 K.B. 571, 578, 579; 35 T.L.R. 609, C.A. applied.

Jones v. *Maynard* [1951] Ch. 572; [1951] 1 T.L.R. 700; [1951] 1 All E.R. 802 and *Rimmer* v. *Rimmer* [1953] 1 Q.B. 63; [1952] 2 T.L.R. 767; [1952] 2 All E.R. 863, C.A. distinguished.

(2) That the question which of the spouses was entitled to recover the expenses as special damage depended upon which of them had incurred the legal liability to pay them and that, the expenses being in respect of necessaries which the husband was under a duty to provide, in the absence of evidence to rebut the presumption that in contracting for them she had done so as agent for her husband, the sole liability was incurred by the husband and that, therefore, the expenses were recoverable as special damage caused to him and not to the wife.

Schneider v. *Eisovitch* [1960] 2 Q.B. 430; [1960] 2 W.L.R. 169; [1960] 1 All E.R. 169 not followed.

ACTION.

The plaintiffs, Henry Charles Gage and his wife, Edith Annie Gage, claimed damages against the defendant, Cecil Arthur John King, in respect of injuries sustained by them on March 15, 1959, when the motor-car in which they were travelling was in collision with a motor-car driven by the defendant. Diplock J. found that the defendant was one-third and the first plaintiff, Henry Charles Gage, two-thirds to blame for the accident.

Certain expenses were incurred as a result of the injuries to the second plaintiff in relation to doctors' and nursing home fees and additional domestic help after she returned home. Most of those expenses had been paid by her husband either by cheque or in cash out of a bank account in the joint names of husband and wife. Some of the doctors' fees were still unpaid and the name of the wife and not of the husband appeared on most of the fee notes. The joint account was fed by income from the husband's investments and business and interest on the wife's investments. Both drew on the account for housekeeping and personal expenses, but there was no evidence of any agreement between them as to the ownership of any balance standing to the credit of the account.

This report is confined to the issue raised by an alternative claim that the expenses incurred as a result of the injuries to the wife were special damage to the wife which she was entitled to recover in full against the defendant.

The facts are more fully stated in the judgment.

P. M. O'Connor Q.C. and *H. B. Grant* for the plaintiffs referred to *Jones* v. *Maynard* [1] and *Rimmer* v. *Rimmer*.[2] The mere fact that the expenses incurred by reason of the injuries to the wife were paid out of a joint banking account fed by money belonging to both, although in unequal proportions, means that the wife has suffered a loss. The balance in the account belonged to both, and had the wife herself drawn the cheques in payment for the expenses, she could have recovered the whole amount: it can make no difference that the cheques were in fact drawn by her husband. It was as much her money as his. Alternatively, one half of the sums paid is recoverable by the wife as her loss.

Martin Jukes Q.C. and *P. Bennett* for the defendant referred to *Schneider* v. *Eisovitch*.[3]

The argument of counsel is fully summarised in the judgment.

DIPLOCK J. stated the facts relating to the accident, found that the defendant was one-third and the first plaintiff two-thirds to blame, awarded general damages of £100 and £750 to the first plaintiff and his wife, respectively, and continued: A point of some difficulty arises in respect of expenses which were incurred as a result of the injuries to Mrs. Gage. These were (a) doctors' fees, (b) nursing home fees and (c) additional domestic help after her return home. The majority of these have been paid by her husband either by cheque drawn by him or in cash. Some of the doctors' fees are, however, still outstanding. As originally pleaded, the full amount was claimed by the husband as part of his special damage. By an amendment made with my leave at the trial, of which notice had been given by letter to the defendants a little over a month ago, they are now claimed in the alternative by Mrs. Gage. The claim is that they are special damage which she is entitled to recover, and to recover in full, against the defendant instead of as to one-third only as would be the case if they are special damage which her husband is entitled to recover.

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[1] [1951] Ch. 572; [1951] 1 T.L.R. 700; [1951] 1 All E.R. 802.

[2] [1953] 1 Q.B. 63; [1952] 2 T.L.R. 767; [1952] 2 All E.R. 863, C.A.

[3] [1960] 2 Q.B. 430; [1960] 2 W.L.R. 169; [1960] 1 All E.R. 169.

The claim that Mrs. Gage is entitled to these damages is based on the fact that as respects the amounts already paid they were paid out of a bank account in joint names on which both could draw cheques on their own signature, and as respects the doctors' fees so far unpaid, her name, not her husband's, appears upon the face of the fee notes.

The plaintiffs are a happily married couple both in their seventies: he is the younger by six or seven years, has been a successful business man and still continues in business. He is obviously the dominant partner in the union. The joint account is fed by the income from his investments, and some at least of these are the profits from his present business which amount to some £1,500 per annum. There is also paid into it the interest on the sum of £2,000 belonging to Mrs. Gage invested in a building society, and this sum was originally a gift from her husband. This interest amounts to £70 per annum or some 4½ per cent. of the total income of the joint account.

Both parties drew on the joint account for housekeeping and personal expenses. There is no evidence as to any express agreement between the parties as to the ownership of any balance from time to time standing to the credit of the account. Mr. O'Connor argues, relying on *Jones* v. *Maynard* [1] and *Rimmer* v. *Rimmer* [2] that the effect of this in law is that the balance standing at any time to the credit of the account is owned in equal moieties by the plaintiffs and that the husband has in fact been paid out of her moneys one-half of the expenses drawn out of that account on his cheques. She has lost, says Mr. O'Connor, at least this amount as a result of her husband's payments of the charges of the doctors, the nursing home and the domestic help which were incurred as a result of her injuries. Indeed, says Mr. O'Connor, and I hope I am doing justice to this branch of his argument, if she herself had drawn the cheques for these expenses, even although they were drawn on the joint account, she could have recovered the whole amount of those payments. The effect on the joint account would have been exactly the same: it cannot make any difference that the cheques were in fact drawn by her husband, therefore she is entitled to recover the whole of these expenses.

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[1] [1951] Ch. 572; [1951] 1 T.L.R. 700; [1951] 1 All E.R. 802.

[2] [1953] 1 Q.B. 63; [1952] 2 T.L.R. 767; [1952] 2 All E.R. 863, C.A.

I think that this argument involves a fundamental misconception as to the legal position as respects a joint bank account operated upon by husband and wife while the parties are still living together. As Atkin L.J. said in *Balfour* v. *Balfour*,[3] "it "is the natural and inevitable result of the relationship of "husband and wife, that the two spouses should make arrange- "ments between themselves. . . . Nevertheless they are not "contracts, and they are not contracts because the parties did "not intend that they should be attended by legal consequences. ". . . The parties themselves are advocates, judges, courts, "sheriff's officer and reporter." No doubt when a marriage breaks up by death, divorce or separation, the court must solve the problem of the destination of the balance in the account—perhaps, as in *Jones* v. *Maynard*[4] property which has been purchased out of it.

Under section 17 of the Married Women's Property Act, 1882, the judge is in terms directed to make, " . . . such order . . . as he "thinks fit." Even in an action where he has no such statutory discretion, he really has to perform a similar task. He gives effect to what he thinks the parties, as reasonable people, would have intended if they had given their minds, which in fact they did not, to what should happen on the break up of the marriage, and in the absence of any other evidence of their intention he may well come to the conclusion that had they thought of it they would have intended to divide it up in equal shares.

But what is to happen to the balance in the joint account when the marriage breaks up is a very different question from that of the mutual rights of the parties in relation to the account while the marriage is still subsisting. As I have said, I do not think that such an arrangement between husband and wife is meant to be attended with legal consequences as between the two spouses while the marriage is still subsisting. Mrs. Gage's right to draw upon the joint account was subject to no legal limitation. It was neither increased nor diminished by the fact that her husband had drawn cheques on it for the expenses of her medical treatment or nursing or for the provision of domestic help any more than it would have been if the expenses had been incurred in respect of her husband's own injuries, and even Mr. O'Connor does not suggest that Mrs. Gage could have recovered as special damage sums paid out of the joint account by her husband for expenses incurred by reason of his own injury. I do not think that the fact that moneys paid by her husband for the expenses incurred in respect of Mrs. Gage's injuries came out of the joint bank account is relevant to the question which I have to determine. Which of the spouses is entitled to recover these sums as special damage depends, in my view, upon which of them incurred the legal liabilities to pay them to the persons who had rendered the services.

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[3] [1919] 2 K.B. 571, 578, 579.

[4] [1951] Ch. 572.

In treating this as the crucial question, I appreciate that I am differing from a recent judgment of Paull J. in *Schneider* v. *Eisovitch*.[5] But it seems to me that this decision is contrary to the ratio decidendi of the Court of Appeal in *Allen* v. *Waters & Co.*[6] (see L.Q.R., Vol. 76 (1960), p. 187).

I start with the proposition that Mrs. Gage had implied authority, which has never in fact been withdrawn or qualified, to pledge her husband's credit for necessaries supplied to her and all these expenses were in respect of necessaries. Her husband was under a legal duty to provide her with them. When a married woman living with her husband makes a contract for the supply of necessaries, prima facie she does so as agent for her husband. There is no evidence here to rebut that presumption. Indeed, there is in fact no evidence that she herself made the contract. Having seen the two of them, the husband, a very young 71, and the wife, if she will forgive my saying so, by no means young, 77, I think it is almost certain that it was the husband who made all the arrangements with the doctors, the nursing home and the domestic help. He in fact settled all the bills and made all the payments. In the statement of claim as originally pleaded he claimed the full amount as special damage incurred by him. As one would expect from a man of his type, he said with perfect frankness in his evidence that he would not expect his wife to repay him; he did not even add the rider "unless she gets it out of the defendant." She is under no legal obligation to repay him.

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[5] [1960] 2 Q.B. 430; [1960] 2 W.L.R. 169; [1960] 1 All E.R. 169.

[6] [1935] 1 K.B. 200; 51 T.L.R. 50, C.A.

I think that the sole liability was incurred by him and is recoverable as special damage caused to him and not to Mrs. Gage. I cannot draw any distinction between those expenses which have already been paid by him and those medical fees, for which liability has already been incurred, which are still outstanding. It is true that most of the fee notes bear her name, although there is no evidence whether the covering envelope was addressed to him or to her. But this in itself is not decisive to rebut the inference that he was the principal and all the other evidence seems to me to point to the conclusion that he was.

It is quite true that Mrs. Gage could have so contracted as to make herself personally liable for the medical, nursing and other expenses incurred in respect of her injuries, and had she done so she could have recovered them as her special damage. She has not satisfied me that she did, and since she has not incurred this loss in law or in fact, it cannot be said that she is any worse off because she and her husband had not the foresight and knowledge of the technicalities of the law as to contribution between joint tortfeasors to make sure that it was her credit that was pledged and not that of her husband. No doubt the defendant or his insurers are about £300 better off as a result, but this sort of situation will continue to arise so long as the law as to recovering contribution from a husband who is partly to blame for a wrong done to his wife remains unaltered, and I cannot feel any moral indignation that the husband is left to bear two-thirds of the expenses incurred by him as a result of an accident for which I have held he was two-thirds to blame.

Accordingly, the amount recoverable by Mrs. Gage is £750, the amount recoverable by her husband is the sum of £100; the agreed special damage incurred in respect of his injuries, £148 14s. and the agreed figure of expenses incurred in respect of the injuries of Mrs. Gage is £449 8s. These, when added together, come to £698 2s., which divided by three comes to £232 14s.

There will be judgment for the first plaintiff for £232 14s. and for the second plaintiff for £750, with costs.

Judgment for the plaintiffs accordingly, with costs.

Solicitors: *Chalton Hubbard & Co. for Marsh & Ferriman, Worthing; Gardiner & Co.*

J. F. L.

THOMPSON *v.* STIMPSON.

1960
Oct. 20.

Lord Parker C.J., Ashworth and Elwes JJ.

Landlord and Tenant—Notice to quit—Computation of period—Premises let as a dwelling—Four weeks' notice given on Friday, May 15, *to expire on Friday, June* 12—"*Not less than four weeks*"—*Whether four clear weeks required—Whether notice valid—Rent Act*, 1957 (5 *&* 6 *Eliz.* 2, *c.* 25), *s.* 16.

By section 16 of the Rent Act, 1957: "No notice by a landlord "or a tenant to quit any premises let . . . as a dwelling shall be "valid unless it is given not less than four weeks before the date on "which it is to take effect."

On their true construction the words "not less than four weeks" in section 16 of the Rent Act, 1957, mean four clear weeks, so that in computing the period of a notice to quit premises let as a dwelling the day from which the notice runs as well as the day on which it expires must be excluded.

Where, therefore, a written notice to quit a cottage, dated and given on Friday, May 15, 1959, gave "four weeks' notice to vacate "and give up possession . . . on Friday, June 12, 1959":—

Held, that the notice to quit, not being a notice of four clear weeks, was invalid under section 16 of the Act of 1957.

Reg. v. *Long* [1960] 1 Q.B. 681; [1959] 3 W.L.R. 953; [1959] 3 All E.R. 559, C.C.A. and *In re Hector Whaling Ltd.* [1936] Ch. 208; 52 T.L.R. 142 applied.

CASE STATED by Norfolk justices sitting at Reepham.

On November 2, 1959, a complaint was preferred under the Small Tenements Recovery Act, 1838, by the respondent, George Edward Stimpson, against the appellant, Sidney George Thompson, that he, George Edward Stimpson, as agent for Edward Stimpson (Farms) Ltd., let to the appellant a tenement at Ollands Road, Reepham, consisting of a cottage and garden for a tenancy from month to month under the rent of £20, namely, at the rate of 6s. a week, and that the tenancy was determined by a notice to quit on June 12, 1959, and that on October 23, 1959, his solicitors served on the appellant a proper notice in writing of their intention to recover possession of the tenement, but that notwithstanding that notice the appellant refused to deliver up possession of the tenement and still retained the same.

The following were among the facts found by the justices: The respondent was the secretary of Edward Stimpson (Farms) Ltd., who farmed about 750 acres, employing between 16 and 20 men. The company had great difficulty in obtaining good labour and when employing married men found it essential to provide a house. The cottage occupied by the appellant was owned by the company. In October, 1957, he was taken into their employ as a tractor driver and general farm worker, being employed as a weekly man from Friday of each week. In consequence of his employment he was allowed to occupy the cottage on the terms that the occupation should be terminable by one month's notice by either party, and that, in consideration of his occupation, his wages, which were paid in arrear on Friday of each week, were reduced by the sum permitted by the current Agricultural Wages Board (Norfolk) Order. At the date of the hearing the amount by which his wages were reduced was 6s. a week. There was no obligation on the appellant to reside in that or any other cottage.

On May 15, 1959, the respondent handed to the appellant a notice in writing, dated May 15, 1959, headed "Edward Stimpson "(Farms) Ltd.," in the following terms: "We hereby give you "one week's notice to terminate your employment with us on "Friday, May 22, 1959, and four weeks' notice to vacate and give "up possession of our cottage in Ollands Road in the parish of "Reepham in the County of Norfolk on Friday, June 12, 1959." The company required the cottage for another employee who had undertaken employment with them on condition that he would be provided with a house in Reepham, and they had no house in Reepham to offer him other than that occupied by the appellant. Proper notice of the intended proceedings was duly served on the appellant on October 23, 1959, but at the time of the hearing he was still in occupation of the cottage. The respondent was duly authorised by the company to make the application to the court.

It was contended by the appellant that the notice to quit was invalid because it did not comply with the provisions of section 16 of the Rent Act, 1957, the contention being that "four weeks" meant four clear weeks, and that from Friday, May 15, to Friday, June 12, was not four clear weeks; that there was no tenancy and that, therefore, the justices had no jurisdiction under the Small Tenements Recovery Act, 1838.

It was contended by the respondent that the notice to quit complied with the provisions of section 16 of the Rent Act, 1957, and was a valid notice, and that the appellant was a tenant of the cottage.

The justices were of opinion that the appellant had been given not less than four weeks' notice and therefore the notice to quit was valid, and that he was the tenant of the cottage. They accordingly made an order that possession of the cottage be given within twenty-eight days.

The appellant appealed.

L. K. E. Boreham for the appellant. The notice to quit was invalid. The notice itself was given, and the proceedings brought, on the basis that the appellant had a tenancy from month to month, so that one calendar month's notice would be required to determine it. But on any view the cottage is " premises let " . . . as a dwelling " to which section 16 of the Rent Act, 1957, applies, and, therefore, a notice to quit is not valid " unless it " is given not less than four weeks before the date on which it is " to take effect." Although there is no authority on the meaning of the words " not less than four weeks " in section 16, there are decisions on similar words in other statutes, the constant tenor of which is that such words oust the general rule that the date of expiry is included in computing a period: see *Reg.* v. *Long*,[1] where the Court of Criminal Appeal, construing the words " at least three days " in section 23 (1) of the Criminal Justice Act, 1948, followed *Rex* v. *Turner*,[2] a decision on the meaning of " not " less than seven days " in section 10 (4) (*b*) of the Prevention of Crime Act, 1908: see also *Chambers* v. *Smith*,[3] under the Uniformity of Process Act, 1832. For cases under non-criminal statutes, see *In re Hector Whaling Ltd.*[4] and *In re Railway Sleepers Supply Co.*[5] Applying the principle running through those cases to the construction of section 16 of the Act a notice of four clear weeks is required, and this notice did not comply with the section and was accordingly invalid.

John Alliott, for the respondent, conceded that if section 16

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[1] [1960] 1 Q.B. 681; [1959] 3 W.L.R. 953; [1959] 3 All E.R. 559, C.C.A.

[2] [1910] 1 K.B. 346; 26 T.L.R. 112; 3 Cr.App.R. 103, C.C.A.

[3] (1843) 12 M. & W. 2.

[4] [1936] Ch. 208; 52 T.L.R. 142.

[5] (1885) 29 Ch.D. 204; 1 T.L.R. 399.

1960

THOMPSON v. STIMPSON.

of the Rent Act, 1957, required a notice of four clear weeks, the notice to quit was invalid. In their context the words "not less "than four weeks" do not oust the general rule that in computing the period the day of expiry, though not the day of service, is included. Section 16 must be construed against the background of the general law of landlord and tenant in force at the time when the Act was passed. Prior to 1957 this tenancy, prima facie a four-weekly tenancy, could have been terminated by a notice given on a Friday to expire four Fridays later, that is, at the end of a current period of the tenancy: *Lemon* v. *Lardeur* [6] and *Crate* v. *Miller*.[7] *Newman* v. *Slade* [8] clearly stated the principle that a weekly tenancy might be determined by a calendar week's notice given on the day corresponding to that on which the tenancy commenced, and that a notice of seven clear days was not required. Section 16 of the Act of 1957 was intended to extend that period of one week's notice to four weeks in accordance with that principle, but that the legislature has multiplied the period by four does not mean that it was intended to add on an extra day. Nor is there anything in the Act to suggest that the notice should be one of four clear weeks. Read in the context of the general law, therefore, section 16 requires four simple weeks' notice and this notice is valid.

Boreham was not called on to reply.

LORD PARKER C.J. This is an appeal by way of case stated by justices for the county of Norfolk sitting at Reepham, before whom a complaint was preferred by the respondent against the appellant under the Small Tenements Recovery Act, 1838, claiming possession of a cottage and garden let for a rent of less than £20 a year, namely, at 6s. per week. The justices determined that this was a case in which possession must be granted, and they so ordered.

A number of points have been raised, but it is sufficient to deal with one point, namely, whether a valid notice to quit was given within section 16 of the Rent Act, 1957. The respondent was acting as agent for a company, Edward Stimpson (Farms) Ltd., who farm some 750 acres, and the appellant, prior to the matters with which we are now concerned, was employed by that company

[6] [1946] K.B. 613; 62 T.L.R. 600; [1946] 2 All E.R. 329, C.A.

[7] [1947] K.B. 946; 63 T.L.R. 382; [1947] 2 All E.R. 45, C.A.

[8] [1926] 2 K.B. 328; 42 T.L.R. 607, D.C.

and was allowed to occupy this cottage, the 6s. a week being deducted from his wages. By a notice given on Friday, May 15, 1959, the respondent determined that employment on Friday, May 22, that was, a week's notice, and also gave four weeks' notice to vacate and give up possession of the cottage on Friday, June 12, 1959. In other words, the notice was served on the appellant on Friday, May 15, to determine on Friday, June 12. The appellant continued to occupy the premises. The steps laid down by the Act of 1838 were taken, and he was served with a notice in writing of the respondent's intention to apply for possession, and the matter came before the justices on November 2, 1959.

The point taken before the justices, and the point taken before this court, is that that notice to which I have already referred, albeit a four weeks' notice, was not a notice of four clear weeks, and it is said that section 16 of the Rent Act, 1957, on its true construction provides for a notice of four clear weeks. The wording of section 16 is as follows: "No notice by a landlord "or a tenant to quit any premises let (whether before or after "the commencement of this Act) as a dwelling shall be valid "unless it is given not less than four weeks before the date on "which it is to take effect." Similar words have come before the court on a number of occasions. The most recent instance is to be found in *Reg.* v. *Long*,[1] which turned on the construction of the words in section 23 (1) of the Criminal Justice Act, 1948, which provided that a notice should be given at least three days before the trial. The Court of Criminal Appeal decided that in that context three days meant three clear days. In the course of giving judgment in that case I myself referred with approval [2] to a passage in Halsbury's Laws of England, 2nd ed., vol. 32, p. 140, where it is said: "When a period is fixed before the expiration "of which an act may not be done, the person for whose benefit "the delay is prescribed has the benefit of the entire period, and "accordingly in computing it the day from which it runs as well "as the day on which it expires must be excluded." That principle is an exception from the ordinary rule that the day of service is not included but that the date of the later event is. In so deciding the court followed the decision of the Court of Criminal Appeal delivered by Channell J. in *Rex* v. *Turner*.[3]

In this court we have also been referred to other cases, in particular to a case concerning the Companies Act, 1929, *In re*

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[1] [1960] 1 Q.B. 681; [1959] 3 W.L.R. 953; [1959] 3 All E.R. 559, C.C.A.

[2] [1960] 1 Q.B. 681, 683.

[3] [1910] 1 K.B. 346; 26 T.L.R. 112; 3 Cr.App.R. 103, C.C.A.

Hector Whaling Ltd.,[4] where Bennett J., considering the meaning of the words in section 117 (2) of the Companies Act, 1929, referring to a general meeting "of which not less than twenty-one "days' notice . . . has been duly given," said[5]: "In the interests "of everybody it is of importance that there should be no doubt as "to the meaning of a phrase in a section of almost daily use. I "do not think there is any doubt about its meaning, and I propose "to found my decision on *Rex* v. *Turner*[6] and *Chambers* v. "*Smith*[7] and to decide that the phrase means twenty-one clear "days exclusive of the day of service and exclusive of the day on "which the meeting is to be held."

As against that, Mr. Alliott refers us to the context and the circumstances in which the Rent Act, 1957, was passed. Before that Act it is quite clear that a seven days' notice was sufficient to determine a weekly tenancy, and that it was unnecessary to have seven clear days. Accordingly, Mr. Alliott says that, looked at against that background, section 16 in effect is saying merely that the seven-day notice is to be extended to a four weeks' notice, and that there is nothing in that Act to suggest that in addition to multiplying the time by four an extra day must be included to make it a notice of four clear weeks. I was impressed by that argument, but at the same time it is to be observed that when that section was passed Parliament must be presumed to know the way in which words such as these had been interpreted in the past. If the intention had been merely to multiply the seven-day notice by four, it would have been perfectly possible to provide that in the case of a weekly tenancy a four weeks' and not a one week's notice must be given. Parliament here, however, has gone further and used words which, construed according to interpretations in the past, provide for four clear weeks. Like Bennett J. in *In re Hector Whaling Ltd.*,[8] I think that there ought to be certainty on this matter, and I prefer the view that the words should be construed as four clear weeks. On that view of the law the justices came to a wrong decision, and this appeal must be allowed.

ASHWORTH J. I agree.

[4] [1936] Ch. 208; 52 T.L.R. 142.

[5] [1936] Ch. 208, 210.

[6] [1910] 1 K.B. 346.

[7] (1843) 12 M. & W. 2.

[8] [1936] Ch. 208.

ELWES J. I agree.

Appeal allowed with costs.

Solicitors: *William Easton & Sons for Mills & Reeve, Norwich; Haslewoods for Hood, Vores & Allwood, Dereham.*

J. F. L.

REGINA *v.* EPSOM JUSTICES.
Ex parte DAWNIER MOTORS LTD.

1960
Oct. 5, 6, 28.

Lord Parker C.J., Ashworth and Elwes JJ.

Justices—Appeal to quarter sessions—Jurisdiction—Third party procedure—Claim to exemption from penalty—Information against third party as actual offender dismissed—Whether appeal lies against imposition of a penalty—Whether third party "other "party" to whom notice of appeal must be given—Merchandise Marks Act, 1926 (16 *&* 17 *Geo.* 5, *c.* 53), *s.* 6*—Magistrates' Courts Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 55), *s.* 84 (1).

Trade Mark—False trade description—Petrol—False trade description of quantity sold stated in receipt—Information against employees as actual offenders—Claim to exemption from penalty—Dismissal by justices of information against employees—Whether appeal lies to quarter sessions against imposition of a penalty—Whether notice of appeal to be given to employees—Merchandise Marks Act, 1887 (50 *&* 51 *Vict. c.* 28), *s.* 2 (2) (*as amended*)*—Merchandise Marks Act,* 1926, *s.* 6*—Magistrates' Courts Act,* 1952, *s.* 84 (1).

Justices—Appeal to quarter sessions—Notice of appeal—Information against third party as actual offender—Dismissal of claim to exemption from penalty—Whether third party "other party" to whom notice of appeal must be given—Magistrates' Courts Act, 1952, *s.* 84 (1).

An information was laid against the applicants under section 2 (2) of the Merchandise Marks Act, 1887,[1] charging them with selling goods to which a false trade description was applied, and informations were also preferred against two employees of the applicants charging them with aiding and abetting the applicants in the commission of that offence. The applicants preferred informations under section 6 of the Merchandise Marks Act, 1926,[2] against the two employees as the actual offenders, so that, on proof that they had used due diligence to enforce compliance with the provisions of the Act and that the employees had committed the offence without their consent, connivance or wilful default, they would be exempt from any penalty. The justices found that the applicants were guilty of the offence charged, that the employees were guilty of aiding and abetting, and that the informations preferred by the applicants against the employees were not made out, and they dismissed the latter informations and fined the applicants £50 on the charge. The applicants appealed against that penalty to quarter sessions, their notice of appeal stating that the general grounds of appeal were that "the penalty was too severe." No notices of appeal were served on either of the employees. Before quarter sessions the applicants sought to establish that in fact they had used due diligence to enforce compliance with the provisions of the Act and that, as the two employees had committed the offence without their consent, connivance or wilful default, they were entitled to exemption from penalty under section 6 of the Act of 1926. Quarter sessions considered that there was no jurisdiction to hear an appeal against the imposition of a penalty, but, considering the penalty imposed was too severe, reduced the fine to £25.

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[1] Merchandise Marks Act, 1887, s. 2 (as amended by the Merchandise Marks Act, 1953, s. 4): "(2) Every "person who sells . . . any goods . . . "to which any . . . false trade "description is applied . . . shall, "unless he proves either—(*a*) that, "having taken all reasonable precau-"tions against committing an offence "against this Act, he had, at the "time of the commission of the "alleged offence, no reason to sus-"pect the genuineness of the . . . "trade description, and . . . (*b*) that "otherwise he had acted innocently; "be guilty of an offence against this "Act . . . (5) If any person feels "aggrieved by any conviction made "by a court of summary jurisdiction, "he may appeal therefrom to a court "of quarter sessions."

On applications for an order of certiorari to quash the conviction on the ground that the justices had come to a conclusion on the information before giving the applicants an opportunity to state their case, and for an order of mandamus requiring quarter sessions to hear their appeal against the finding of the justices that they (the applicants) had failed to show themselves entitled to exemption under section 6 of the Act of 1926:—

Held, (1) that the procedure to be adopted at the hearing of any charge such as that under section 2 (2) of the Merchandise Marks Act, 1887, must enable a defendant to raise the matters of defence open to him, and it was only after that had been done and he had been found guilty that the court could go on to consider whether he could obtain exemption from penalty, but that, on the evidence, the applicants had failed to show that that procedure had not been adopted and the application for certiorari must accordingly be dismissed.

[2] Merchandise Marks Act, 1926, s. 6: "Where an employer or principal is charged with the offence of "having acted in contravention of, or "failed to comply with, the provisions "of this Act . . . he shall be entitled "on information duly laid by him ". . . to have any other person whom "he charges as the actual offender "brought before the court . . . and, "if after the commission of the "offence has been proved, the "employer or principal proves to the "satisfaction of the court that he "has used due diligence to enforce "compliance with the provisions of "this Act . . . and that the said other "person had committed the offence "in question without his consent, con"nivance or wilful default, the said "other person shall . . . be summarily "convicted of the offence, and the "employer or principal shall be "exempt from any penalty. . . ."

(2) That an appeal would lie to quarter sessions from the dismissal by justices of a claim to exemption from penalty under statutory third party procedure of the type found in section 6 of the Merchandise Marks Act, 1926, in the same way as it lay in the case of statutory third party procedure going to defence, for the third party information was not a separate proceeding, nor was the exemption or acquittal, as the case might be, conditional on the conviction of the actual offender.

Malcolm v. *Cheek* [1948] 1 K.B. 400; 64 T.L.R. 28; [1947] 2 All E.R. 881, D.C. and dictum of Humphreys J. in *Rex* v. *Recorder of Derby, Ex parte Spalton* [1944] 1 K.B. 611, 617; 60 T.L.R. 445; [1944] 1 All E.R. 721, D.C. applied.

A. Walkling Ltd. v. *Robinson* (1930) 99 L.J.K.B. 171; 46 T.L.R. 151, D.C. considered.

(3) But that an employee against whom an information had been preferred as the actual offender was an "other party" within section 84 (1) of the Magistrates' Courts Act, 1952, to whom notice of appeal must be given, and that, since no notices of appeal were given to the employees, and the notice of appeal which was given was on its face a notice of appeal against severity of sentence and not against the refusal to grant the statutory exemption from penalty, the notices of appeal were not in order, and that, therefore, appeal to quarter sessions being a creation of statute, the application for mandamus must also be refused.

Rex v. *Recorder of Derby, Ex parte Spalton* (supra) applied.

APPLICATIONS for orders of certiorari and mandamus.

The following statement of facts is taken from the judgment of Lord Parker C.J.

On April 6, 1959, a summons was issued and subsequently served on the applicants, Dawnier Motors Ltd., to answer an information prefered by Leslie George Greenhill, a Divisional Inspector of Weights and Measures, that on March 14, 1959, they did unlawfully sell to David James Mackie 3 gallons 4¼ pints of petrol to which a false trade description was applied in that, at the time of sale, a cash sales receipt was given to David James Mackie wherein the quantity of petrol sold was stated to be 4 gallons, contrary to section 2 (2) of the Merchandise Marks Act, 1887. Two employees of the applicants, Hunt and Nichols, were also summoned to answer informations preferred by the inspector that they had aided and abetted the applicants in committing the offence charged and further that they had committed wilful fraud in the use of a petrol pump.

On April 13, 1959, the applicants under the provisions of section 6 of the Merchandise Marks Act, 1926, preferred informations against Hunt and Nichols that they were the actual offenders so that on proof that the applicants had used due diligence to enforce compliance with the provisions of the Act, and that Hunt and Nichols had committed the offence without their consent, connivance or wilful default, they would be entitled to exemption from any penalty.

On May 11, 1959, all the informations preferred against the applicants and against the employees were heard together by the justices of the Petty Sessional Division of Epsom, when the justices found that the applicants had committed the offence charged, and that the employees had aided and abetted the commission thereof. The justices, however, found that the informations preferred by the applicants against the employees were not made out. In the result, the justices fined the applicants £50 and ordered them to pay 10 guineas costs, and fined each of the employees £10.

By an amended notice of appeal dated May 29, 1959, the applicants appealed to the Appeals Committee of the Quarter Sessions for the County of Surrey stating that the general grounds of such appeal were that "the penalty imposed was too severe." The appeal was heard on June 26, 1959, when the appeals committee held that they had no jurisdiction to rehear the question whether the applicants could prove what may shortly be called the necessary due diligence and non-connivance to enable them to be exempt from any penalty. The appeals committee did, however, consider that the penalty imposed was too severe and reduced it to a fine of £25.

The applicants applied to the court for an order of certiorari to bring up and quash the order of the justices convicting them of the offence on the ground, inter alia, that the justices had come to a conclusion on the information without first giving them an opportunity to state their defence to the charge, The facts on which that application was based do not call for report.

The applicants also applied for an order of mandamus requiring quarter sessions to hear their appeal against the justices' finding that they had failed to show themselves entitled to exemption from penalty as provided by section 6 of the Merchandise Marks Act, 1926, on the ground that quarter sessions had wrongfully held itself bound in law under section 6 to refuse to hear, and had refused to hear, that appeal.

Eric Crowther and *John Clark* for the applicants. The defences open to a defendant under section 2 (2) (*a*) and (*b*) of the Merchandise Marks Act, 1887, and the right to claim exemption from penalty under section 6 of the Merchandise Marks Act, 1926, are not mutually exclusive. The applicants, therefore, should have been given an opportunity to tender evidence and address argument to the justices before they were convicted. It is appreciated that there is a conflict of evidence on this issue, but, if the applicants were not given such an opportunity, the conviction was contrary to natural justice, and they are entitled to an order of certiorari. [Reference was made to *Rex* v. *Wandsworth Justices, Ex parte Read.*[3]]

Quarter sessions had jurisdiction to hear the applicants' appeal against the justices finding, under section 6 of the Act of 1926, of failure to use due diligence and the imposition of a penalty. When the Merchandise Marks Act, 1887, was passed, there was no right of appeal to quarter sessions from a decision of a court of summary jurisdiction unless it had been given specifically by statute (see section 19 of the Summary Jurisdiction Act, 1879). Section 2 (5) of the Act of 1887 specifically gave such a right, which was subsequently reinforced by section 37 (1) of the Criminal Justice (Administration) Act, 1914, and see, now, section 83 of the Magistrates' Courts Act, 1952. A general right of appeal given by statute cannot be limited by a subsequent statute: and, therefore, section 6 of the Act of 1926, in giving a special right of exemption from penalty in certain circumstances, did not take away or affect the right of appeal under section 2 (5) of the Act of 1887. But if it did, the right of appeal was restored by section 83 of the Magistrates' Courts Act, 1952, for a general appeal is effective notwithstanding any special rights: *Walker* v. *Hemmant.*[4] There is also a general right of appeal against sentence under section 83 (1) of the Magistrates' Courts Act, 1952. That right must include a right to appeal against a finding by justices of failure to show entitlement to exemption from penalty under section 6 of the Act of 1926. Section 83 (3) of the Magistrates' Courts Act, 1952, defines " sentence " as " any order " made on conviction by a magistrates' court ": a necessary ingredient of the order made by the justices imposing a penalty on conviction was the finding that there had been a lack of due diligence. The applicants, therefore, are entitled to appeal against that finding. It would be strange if the justices were the final arbitrators in such a matter.

The conviction of the person brought before the court as the actual offender is not a condition of an appeal against a refusal to grant statutory exemption from penalty. The physical presence of the actual offender is not necessary in such proceedings: compare *Malcolm* v. *Cheek.*[5] The proceedings at quarter sessions are not new proceedings; no pleas are taken and the question whether a third party who had been acquitted by the court of summary jurisdiction could plead autrefois acquit does not arise. It was not incumbent on the applicants to bring the two employees before quarter sessions or to serve notice of appeal on them. They had done all that was necessary to obtain exemption from penalty in bringing them before the court of summary jurisdiction and, therefore, it was open to them to give evidence of due diligence and non-connivance before quarter sessions. Moreover, the employees had been convicted of aiding and abetting the commission of the offence. The decision in *A. Walking Ltd.* v. *Robinson*[6] depended on the particular fact that the defendants had brought the wrong person before the court, and that case is not an authority which precludes employers in a case such as this from appealing to quarter sessions: *per* Avory J. in *R. C. Hammett Ltd.* v. *Crabb.*[7] In *R. C. Hammett Ltd.* v. *London County Council*[8] no point was taken that there had been an appeal to quarter sessions, and the only comment was made by Avory J.[9] There is no procedure whereby a third party in proceedings such as these can be compelled to appear before quarter sessions. But the fact that the applicants had no power to bring the two employees before quarter sessions does not take away their right of appeal. Since there is no machinery whereby their attendance at quarter sessions could be enforced, it would have been idle to serve notices of appeal on the employees: a fortiori if the argument for the prosecutor that the employees could have pleaded autrefois acquit is right.

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[3] [1942] 1 K.B. 281; 58 T.L.R. 88; [1942] 1 All E.R. 56, D.C.

[4] [1943] K.B. 604; [1943] 2 All E.R. 160, D.C.

Although the fine finally imposed was small, it is important to the applicants that they should have an opportunity to protect their good trade name and to show that they in fact used due diligence. The court, therefore, is asked to exercise its discretion to grant the order of mandamus.

Robin Simpson for the prosecutor was not called on for argument on the application for certiorari.

Whether or not quarter sessions have jurisdiction to hear an appeal from a refusal by justices to grant a statutory exemption from penalty, there was no jurisdiction to hear such an appeal in this case, because the notice of appeal was not in order. Rule 59 of the Magistrates' Courts Rules, 1952, requires that a notice of appeal "shall state the general grounds of appeal"; the rule is mandatory, and since the applicants' notice related only to the severity and not to the imposition of the penalty the jurisdiction of quarter sessions was confined to the amount of the fine imposed: compare *Paprika Ltd.* v. *Board of Trade.*[10]

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[5] [1948] 1 K.B. 400; 64 T.L.R. 28; [1947] 2 All E.R. 881, D.C.

[6] (1930) 99 L.J.K.B. 171; 46 T.L.R. 151, D.C.

[7] (1931) 145 L.T. 638, 641; 47 T.L.R. 623, D.C.

[8] (1933) 49 T.L.R. 209, D.C.

[9] Ibid. 212.

[ASHWORTH J. referred to section 84 of the Magistrates' Courts Act, 1952, and the note thereto in Stone's Justices Manual, 88th ed. (1956), p. 95.]

These are complex proceedings where a third party had been brought in and, therefore, notices of appeal should have been served on the employees under that section. The hearing at quarter sessions is in fact a retrial, so that it is incumbent on defendants relying on section 6 of the Act of 1926 to take all the steps before quarter sessions which the section requires them to take before the court of summary jurisdiction.

In general, a prosecutor may not appeal from an acquittal by a court of summary jurisdiction (except where the power to do so is specifically given by statute) unless he can show that the decision was perverse, or on a point of law, when the appeal lies by case stated to the Divisional Court. [Reference was also made to the judgment of Avory J. in *R. C. Hammett Ltd.* v. *Crabb.*[11]] The applicants are seeking, inter alia, to appeal against the acquittal of the employees. No such right of appeal is given to a prosecutor by either the Merchandise Marks Act, 1887, or the Merchandise Marks Act, 1926. Neither the right of appeal given by section 2 (5) of the Act of 1887 to a person "aggrieved by any conviction," nor the right under section 83 of the Magistrates' Courts Act, 1952, of appeal by a "person convicted" assists the applicants here, for they seek to appeal, not against a conviction, but from the acquittal of the employees. *Malcolm* v. *Cheek*[12] should be distinguished; there the actual offender was not before the court of summary jurisdiction and there was, therefore, no acquittal. Moreover, the defence raised in that case was under section 83 (1) of the Food and Drugs Act, 1938, which provides that the actual offender "may," and not, as in section 6 of the Merchandise Marks Act, 1926, "shall," be convicted. Whatever the position under similar provisions in other statutes, under section 6 of the Act of 1926 the conviction of the actual offender is a condition precedent to exemption from penalty.

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[10] [1944] K.B. 327; 60 T.L.R. 203; [1944] 1 All E.R. 372, D.C.

[11] 145 L.T. 638, 641.

[12] [1948] 1 K.B. 400.

Crowther in reply. The grounds stated in the notice of appeal were sufficient to cover an appeal against the imposition of a penalty. "Penalty" presupposes the imposition of a penalty, and that raises the question whether due diligence was used, so that that question was open before quarter sessions. *Paprika Ltd.* v. *Board of Trade*,[13] where there was a plea of guilty and the appeal was out of time, does not assist the court. Reliance is placed on the wording of both section 2 (5) of the Act of 1887 and section 83 (1) of the Magistrates' Courts Act, 1952. The words "person . . . aggrieved by any conviction" in the former are wide enough to cover any matter inherent in the conviction. A person is aggrieved by a decision made against him which wrongly deprives him of something; the applicants were deprived of their good name as traders by the justices' findings under section 6 of the Act of 1926, and that is inherent in the conviction. But in any event, an appeal against the imposition of a penalty is within the right to appeal against sentence under section 83 (1) of the Magistrates' Courts Act, 1952.

There is no necessity to serve notice of appeal on persons brought before a court of summary jurisdiction in third party proceedings such as these. The cases cited in Stone's Justices Manual, 88th ed. (1956), p. 95, in support of that proposition do not bear it out. [Reference was also made to *Elkington* v. *Kesley*[14] and *Rex* v. *Recorder of Derby, Ex parte Spalton*.[15]]

Lord Parker C.J. The court dismisses both these motions, but since both sides have asked us to decide a rather obscure point, we will take time and give our reasons at a later date.

October 28. Lord Parker C.J. read the following judgment: On October 5, 1959, Mr. Crowther moved on behalf of the applicants, Dawnier Motors Ltd., first, for an order of certiorari to bring up and quash an order made by the justices of the Petty Sessional Division of Epsom on May 11, 1959, convicting the applicants of an offence against section 2 (2) of the Merchandise Marks Act, 1887, and inflicting a fine, and secondly, and in the alternative, for an order of mandamus to the Appeals Committee of the Quarter Sessions for the County of Surrey requiring the appeals committee to hear the appeal by the applicants from the order of petty sessions in so far as the applicants claimed to be exempt from any penalty under section 6 of the Merchandise Marks Act, 1926. At the end of the hearing we dismissed both the motions and stated that we would give our reasons at a later date.

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[13] [1944] K.B. 327.

[14] [1948] 2 K.B. 256; 64 T.L.R. 340; [1948] 1 All E.R. 786, D.C.

[15] [1944] K.B. 611; 60 T.L.R. 445; [1944] 1 All E.R. 721, D.C.

[His Lordship stated the facts as set out above and continued:] The ground upon which certiorari is claimed is that the justices found that the applicants had been guilty of the offence without giving them the opportunity of stating their defence to the charge and calling evidence in regard thereto. This, it is said, was contrary to natural justice and, accordingly, the conviction should be quashed.

Before considering this contention, reference must be made to the relevant statutory provisions. By section 2 (2) of the Merchandise Marks Act, 1887, as amended by section 4 of the Merchandise Marks Act, 1953, it is provided as follows: "Every "person who sells, or exposes for, or has in his possession for, "sale, or any purpose of trade or manufacture, any goods or "things to which any forged trade mark or false trade description "is applied, or to which any trade mark or mark so nearly resemb"ling a trade mark as to be calculated to deceive is falsely "applied, as the case may be, shall, unless he proves either— "(*a*) that, having taken all reasonable precautions against com"mitting an offence against this Act, he had, at the time of the "commission of the alleged offence, no reason to suspect the "genuineness of the trade mark, mark or trade description, and "that, on demand made by or on behalf of the prosecutor, he gave "all the information in his power with respect to the persons "from whom he obtained such goods or things; or (*b*) that other"wise he had acted innocently; be guilty of an offence against "this Act." Further, by section 6 of the Merchandise Marks Act, 1926, it is provided: "Where an employer or principal is charged "with the offence of having acted in contravention of, or failed "to comply with, the provisions of this Act or any Order in "Council made under this Act he shall be entitled on information "duly laid by him and on giving not less than three days' notice "of his intention to the prosecution to have any other person "whom he charges as the actual offender brought before the "court at the time appointed for hearing the charge, and, if after "the commission of the offence has been proved, the employer "or principal proves to the satisfaction of the court that he has "used due diligence to enforce compliance with the provisions "of this Act or of the Order, and that the said other person "had committed the offence in question without his consent, "connivance or wilful default, the said other person shall, "subject to the provisions of subsection (5) of the last preceding "section, be summarily convicted of the offence, and the "employer or principal shall be exempt from any penalty."

It will be seen, therefore, that the only matters of defence which can be raised are those contained in paragraphs (*a*) and (*b*) of section 2 (2) of the Act of 1887. If a defendant fails to prove either of those matters he is guilty of the offence. He has, however, a right under section 6 of the Act of 1926 to have the actual offender brought before the court, and on proof of due diligence and non-connivance to have the actual offender convicted and obtain for himself a statutory exemption from any penalty. Accordingly, the procedure to be adopted at the hearing of any such charge must enable a defendant to raise matters of defence, and only after this has been done and he has been found guilty should the justices go on to consider whether he can obtain exemption from penalty. It is this procedure which the applicants claim that the justices failed to adopt in the present case. [His Lordship considered the evidence relating to that claim and continued:] The onus is, of course, always on an applicant for certiorari to satisfy the court as to the facts on which the application is based. This, in my judgment, the present applicants have failed to do and, accordingly, the application for certiorari must be refused.

The application for mandamus raises a point of considerable difficulty which, so far as I know, has never been finally decided, namely, whether an appeal lies on a claim for exemption from penalty under section 6 of the Act of 1926. It was urged before the appeals committee and before us that no such appeal lies in that exemption from penalty is dependent on the conviction of the actual offenders, and that since Hunt and Nichols had, in effect, been acquitted before the justices, they could not be convicted by the appeals committee. This was the view which appealed to the appeals committee, who accordingly refused to consider whether the applicants were entitled to the statutory exemption from penalty.

Third party procedure of the type found in section 6 of the Act of 1926 is to be found in many statutes. In some it takes the form, as here, of saying that on proof of due diligence and non-connivance the actual offender shall be convicted and that the defendant to the original charge shall be exempt from penalty:

cf. Shops Act, 1950, s. 71 (6), and Sale of Food (Weights and Measures) Act, 1926, s. 12 (5). In others it takes the form of providing not for exemption from penalty but for acquittal: cf. Food and Drugs Act, 1955, s. 113 (1) and Factories Act, 1937, s. 137 (1). In the latter class of case, unlike the present, the third party procedure goes to matters of defence. Again, in some cases it is provided that on proof of due diligence and non-connivance the actual offenders " may " as opposed to " shall " be convicted: cf. Food and Drugs Act, 1938, s. 83 (1). In cases in which the third party procedure goes to matters of defence it would indeed be odd if those matters could not be raised on appeal. Indeed, it seemed to me that counsel for the respondent in the present case felt bound to concede that an appeal in such a case would lie, but he contended that the position was different where, as here, the third party procedure went only to penalty. I confess that I can see no logical reason for the distinction. It is true that there is no question of escaping conviction, and that on appeal, due diligence and non-connivance could be proved in mitigation so as to reduce the penalty to an absolute discharge or a nominal fine, but unless there is an appeal the convicted person is at the mercy of the court and cannot claim statutory exemption from any penalty.

In my judgment an appeal lies in all these cases. There are, I think, two fallacies underlying the respondent's argument. In the first place, it is wrong to look upon the third-party proceedings as separate proceedings. It is true that they take the form of a separate information, but I think the true view is that the original information and the third-party information are all one proceeding. This, indeed, was the view expressed by Humphreys J. in *Rex* v. *Recorder of Derby*, *Ex parte Spalton*,[1] and I agree with it. In the second place, it is, I think, wrong to look upon acquittal or exemption from penalty, as the case may be, as conditional upon the conviction of the actual offenders. The provisions in regard to third-party procedure do not say so. They only provide that once it is proved that the third party is the actual offender, and that the defendant has proved due diligence and non-connivance, two results will follow, first, conviction of the actual offender, and, secondly, exemption from penalty or acquittal of the defendant. Assuming, though not deciding, that on an appeal by an employer whose third-party information has been dismissed it is not open to the appeals committee to bring about the first of these results, namely, conviction of the actual offender, it does not follow that the second result, namely, exemption from penalty or acquittal of the defendant, is thereby rendered impossible. Support for this construction is, I think, to be found in *Malcolm* v. *Cheek*.[2] In that case a defendant charged with an offence against the Food and Drugs Act, 1938, availed himself of the third-party procedure contained in section 83 (1) of the Act, a third-party procedure which dealt with matters of defence. Through no fault of the defendant the third party was not served, and accordingly was not before the court and could not be convicted. Yet it was held by this court that the defendant who had proved that the third party was the actual offender and had also proved due diligence and non-connivance was entitled to be acquitted. In his judgment Lord Goddard C.J. said[3]: "In my opinion, the original defendant had done "everything in this case which it was necessary for him to do "to avail himself of the defence which the section affords, and "the magistrate having come to the conclusion that the contra-"vention was due to the act or default of the person against "whom the information was laid, and not of the defendant, and "also that the defendant had used all due diligence to secure "that the provisions of the Act were complied with, was entitled "to hold, and rightly held, that the defendant was entitled to "avail himself of the defence which is allowed." It is true that section 83, unlike the section now under consideration, merely provided that the third party "may be convicted of the offence," but I cannot think that the decision of the court would have been any different if the words had been "shall be convicted of the "offence."

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[1] [1944] K.B. 611, 617; 60 T.L.R. 445; [1944] 1 All E.R. 721, D.C.

It is also to be noted that a person who has been convicted and fined has now an undoubted right to appeal against sentence. An employer whose third-party information has been dismissed and who wishes to appeal against that dismissal is in truth appealing against his sentence and claiming exemption from any penalty. There is no statutory provision excluding such an appeal against sentence, and if what has been loosely termed an appeal under section 6 is regarded as an appeal against sentence (which in essence it is), there is no reason for deciding that it cannot be entertained.

Although, as I have already said, the point has not so far been finally decided, we were referred to several cases touching on the matter. In *A. Walkling Ltd.* v. *Robinson*[4] employers, prosecuted under the Sale of Food (Weights and Measures) Act, 1926, for the sale of bread of less weight than it purported to be, exercised the third-party procedure laid down in section 12 (5) of the Act against an employee, one Pearce, alleging that he was the actual offender. The justices refused to convict Pearce and did not exempt the employers from penalty. There was an appeal to quarter sessions, who stated a case for the decision of the Divisional Court, one of the questions left for the decision of the court being whether the court of quarter sessions had any power to exempt the appellants from any penalty having regard to the fact that the employee had been acquitted. It was held by this court that quarter sessions had no such power, and indeed one member of the court, Talbot J., referred[5] to the relief given by the subsection as "conditional" upon the conviction of the actual offender.

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[2] [1948] 1 K.B. 400; 64 T.L.R 28; [1947] 2 All E.R. 881, D.C.

[3] [1948] 1 K.B. 400, 407.

At first sight, therefore, this would appear to be a decision in favour of the respondent's contention in the present case. That, however, was a case in which the justices had expressly found that while due diligence had been exercised the wrong third party had been brought before the court in that Pearce was not the actual offender. This, indeed, was pointed out by Avory J., who had been a member of the court, in the later case of *R. C. Hammett Ltd.* v. *Crabb*.[6] In that case he said[7]: "I "only wish to add that I reserve my opinion upon the question "which I have more than once asked during the progress of this "case, namely, whether the employer or principal has not a "right of appeal to quarter sessions in a case where the justices "have convicted the principal and have refused to convict the "employee or manager. In my view the case of *A. Walkling Ltd.* "v. *Robinson*,[8] which Mr. Comyns Carr relied upon in answer "to that point, is not an authority that precludes employers in "such cases from appealing to quarter sessions on a question "of fact, because in that case it was expressly found that the "manager or employee had not in fact committed the offence "and he had been acquitted by the justices. The difficulty that "was pointed out in that case was that the appellants could not "appeal to quarter sessions against their own conviction without "saying that the manager had been improperly acquitted, and it

[4] (1929) 99 L.J.K.B. 171; 143 L.T. 105.

[5] 99 L.J.K.B. 171, 180.

[6] (1931) 145 L.T. 638.

[7] Ibid. 641.

[8] 99 L.J.K.B. 171.

"was not open to them in that case to say that he had been "improperly acquitted. For that reason I do not think that "case is any authority, and to avoid the difficulties which have "arisen in this case I only wish to reserve, as I have said, my "opinion as to whether the proper procedure, instead of stating "the case as if it were a question of law, would be an appeal to "quarter sessions on the facts."

Finally, in *R. C. Hammett Ltd.* v. *London County Council*[9] Avory J. treated the question as undecided, saying[10]: "I only "wish to say that it must not be taken as an authority for the "proposition that an appeal does lie to quarter sessions. That "point, although it appears to have been raised at quarter "sessions, was not decided there, and this present special case "does not raise the point. It is desirable, in my opinion, that "the question whether there is an appeal to quarter sessions under "such circumstances should be determined at some time." Accordingly, there is, I think, nothing in the cases which prevents me from coming to the conclusion, as I do, that an appeal lies on the question of exemption from penalty.

The matter does not, however, rest there. As Croom-Johnson J. said in *Rex* v. *Recorder of Derby, Ex parte Spalton*[11]: "Appeal to quarter sessions is the creation of statute. Although "such an appeal is by way of a rehearing the party desiring to "appeal has to give proof of certain facts, and the first question "which arises is whether the notices of appeal are in order."

In the present case, as I have already said, the amended notice of appeal stated: "The general grounds of such appeal "are that the penalty imposed was too severe." The notice, therefore, on its face was merely a notice of appeal against severity of penalty and was not against refusal to grant statutory exemption from penalty. Again, it is provided by section 84 (1) of the Magistrates' Courts Act, 1952, that the notice of appeal must be given to "the clerk of the magistrates' court and to the "other party." "Other party" clearly includes "other parties," and I am quite clear that in an appeal against failure to grant statutory exemption from penalty or acquittal, as the case may be, the third party is a party to whom notice must be given under that provision: see again, in this connection, *Rex* v. *Recorder of Derby, Ex parte Spalton.*[11]

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[9] (1933) 49 T.L.R. 209.

[10] Ibid. 212.

[11] [1944] K.B. 611, 619.

On these narrow, though as it seems to me valid, grounds, I think that the application for mandamus also fails.

ASHWORTH J. I agree entirely with the judgment which has just been given.

ELWES J. I also agree.

Applications dismissed with costs.

Solicitors: *Sharpe, Pritchard & Co. for A. R. Drummond & Co., Epsom; Crofts & Ingram and Wyatt & Co. for W. W. Ruff, Kingston-on-Thames.*

J. F. L.

HORTON *v.* HORTON (No. 2).

[Plaint No. 004271.]

C. A.

1960
Oct. 31;
Nov. 1.

Ormerod, Willmer and Upjohn L.JJ.

Husband and Wife — Maintenance — Agreement — Alteration — Consideration—Separation deed—Covenant by husband to pay wife monthly sum—Supplemental agreement not under seal obliging husband to pay sum tax free—Supplemental agreement declared to express parties' original intention—Whether supplemental agreement unenforceable for want of consideration—Whether wife's refraining from suit for rectification sufficient consideration.

In March, 1954, a husband and wife entered into a separation agreement under seal, by which the husband covenanted to pay the wife "the monthly sum of £30" during their joint lives. The husband paid the agreed sum for some months, until, in January, 1955, the wife decided to take employment and consulted her then solicitor, who put before the husband a supplemental agreement, not under seal, indorsed on the back of the original deed, which the husband read through and which both parties signed.

By that memorandum it was mutually agreed that words should be inserted in the original covenant for the monthly payments which had the effect of changing the husband's obligation from paying £30 a month less tax to an obligation to pay £30 free of tax; and it was further declared that the original deed had always been interpreted by the parties as if the amending words had been in the original deed when it was executed.

The husband, who was not independently advised as to the effect of the supplemental memorandum, continued to pay the wife £30 a month without deducting tax or accounting in any way to the

Commissioners of Inland Revenue for the tax notionally deducted, until, in May, 1958, they claimed £360 arrears of tax. The husband thereafter stopped paying the annuity to the wife, who brought proceedings against him in the county court to recover arrears under the deed and the memorandum. The county court judge held that the agreement was enforceable as a document executed for consideration, namely, the removal of doubt as to the parties' original intention. On appeal by the husband:—

Held, dismissing the appeal, that the supplemental agreement was a document executed for consideration, and enforceable against the husband, for as the original deed did not carry out the parties' intention, the wife would have been entitled to take proceedings for rectification; and the compromise by which she refrained from any such suit on condition that the parties executed the supplemental agreement constituted consideration.

Appeal from Judge Geoffrey Howard, sitting at West London County Court.

On March 12, 1954, a husband and wife, who had been married in 1942, entered into a separation agreement under seal. The deed contained a number of covenants common in a separation deed, such as provided that the wife might live separate and apart from the husband, and a mutual covenant not to molest. Covenant 3 was as follows: "The husband shall during the joint lives of him-"self and the wife so long as the wife shall perform and observe the "agreements and stipulations on her part herein contained pay "to the wife the monthly sum of £30 on the first day in every "month during the continuance of these presents."

The husband in fact paid the £30 each month without any deduction of tax, although it was plain on the construction of that deed that he should have deducted tax and have accounted in one way or another to the Inland Revenue authorities. After 10 months of such payments, the wife decided to supplement her income by going out to work, and she consulted her then solicitor, F., in January, 1955. The solicitor, as the county court judge said, "was quick to perceive that if she did so and the husband "under the form of agreement as it stood changed his mind and "elected to deduct tax, she might well suffer loss in no longer "being able to reclaim the full rebate." Accordingly, the solicitor asked the husband to call on him and put in front of him a supplemental agreement which the husband read through and signed without any separate independent legal advice. The supplemental agreement, not under seal, was indorsed on the back of the original separation deed, and was as follows: "It is hereby "mutually agreed between the parties hereto that clause 3 of the "within-written agreement shall be amended by the insertion "after the words 'monthly sum' of the words 'which after deduc-"'tion of income tax shall amount to the clear sum of £30 each "'month.' It is further declared that the within-written agree-"ment was and always has been interpreted by the parties hereto "as if the said amendment had been originally in the said agree-"ment when the same was first executed." The husband and wife both signed that supplemental agreement and it was witnessed by the wife's then solicitor.

The effect of that supplemental agreement, if enforceable, was to change the obligation of the husband from paying £30 a month less tax to the wife into an obligation on him to pay £30 a month "tax free," namely, such sum as after deduction of tax should amount to £30.

The husband continued to pay £30 a month until some time in May or June, 1958, when for the first time the Inland Revenue authorities made a claim on him for £360 tax notionally deducted by him on making the payments to his wife. The husband's income from all sources was £758, so that he had an insufficient fund of taxed income to pay the £30 a month and retain the tax which he notionally deducted from the wife's annuity, and some part of the tax which he notionally deducted ought to have been accounted for by him to the Inland Revenue.

On receiving that demand, the husband stopped paying the £30 to his wife and, accordingly, in June, 1958, she claimed that sum in the county court. The husband wrote a letter by way of defence to that claim but ultimately allowed the matter to go by default, and consented to judgment for £30 being given against him. On December 7, 1959, the wife claimed a further £384 arrears of the annuity, and on the hearing of that claim the county court judge, on April 5, 1960, gave judgment for the wife. The husband appealed.

Meanwhile, on December 18, 1959, the husband started proceedings under the Maintenance Agreements Act, 1957, to vary the provisions of the deed of 1954. His application was heard before Mr. Registrar Kinsley, who gave judgment against him on March 25, 1960. He appealed from that judgment and his appeal came before Karminski J. in April, 1960, when the matter was adjourned, on the ground that as the husband sought to appeal to the Court of Appeal from the judgment of the county court judge, the appeal in the Probate, Divorce and Admiralty Division should await the outcome of the present appeal.

Richard Moulton-Barrett for the husband. Where there is a variation of a separation deed there must be good consideration for the variation if it is to be enforceable at law: *Berry* v. *Berry*.[1] There was no consideration for this supplemental memorandum, which confers a benefit on the wife and casts a new and heavy burden on the husband; and, therefore, it is not enforceable against him. The county court judge held that the consideration consisted in the removal of doubt as to the intention of the original deed; but that cannot be right, for the original deed was clear and unambiguous and required no explanation.

If there was a new agreement between the parties, the consideration for it must be definable to be enforceable. It cannot be said that the consideration consisted in the wife's refraining from taking proceedings for rectification, for if that were so the supplemental memorandum would have contained the terms of the rectification which might have been asked for, including some such term as is usual, whereby the wife covenants to repay to the husband the tax deducted; and the effect of the memorandum would have been less onerous to the husband and less beneficial to the wife than is the effect of this memorandum. The suggested consideration of avoiding a suit for rectification is too nebulous to make the document enforceable at law. The parties had no identity of understanding as to its effect. The husband intended that the wife should have £30 in her pocket, whereas the effect of the "free of tax" provision is that when she is not working she has very much more than that in her pocket: see Rayden on Divorce, 7th ed., p. 671, and *Spilsbury* (*Inspector of Taxes*) v. *Spofforth*[2] as to the effect of "free of tax" provisions. [*Combe* v. *Combe*[3] was also referred to.]

John Nevin for the wife. The supplemental memorandum is enforceable at law. First, there was consideration for it in that where parties have made an enforceable agreement and a subsequent agreement is entered into by the same parties to replace the former, that later agreement is covered by the same consideration as the former. Authority for that somewhat startling proposition is to be found in two old cases: *Woolliscroft* v. *Watson*[4] which has never yet been considered by the Court of Appeal; and *Page* v. *Cowasjee Eduljee*,[5] where the Judicial Committee dissented obiter from the proposition of the Chief Justice of Ceylon "that if a defendant 'knowingly signed conditions which imposed the new "'obligation on him of paying any loss arising from a re-sale, "'such fresh agreement would be insufficient to maintain an "'action, being entirely without consideration'" because, as Lord Chelmsford said, "under such circumstances, the relinquish-"ment of the first agreement would undoubtedly amount to a sufficient consideration."

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[1] [1929] 2 K.B. 316; 45 T.L.R. 524.

[2] [1937] 4 All E.R. 487.

[3] [1951] 2 K.B. 215; [1951] 1 T.L.R. 811; [1951] 1 All E.R. 767, C.A.

[4] (1858) 31 L.T.O.S. 13.

[5] (1866) L.R. 1 P.C. 127, 143.

[ORMEROD J. That does not apply here, for there was no mutual agreement by the parties to forgo their rights under the original agreement.]

Secondly, the consideration here was the wife's agreeing to compromise when she could have had a suit for rectification which her husband could not have resisted. Moreover, she abandoned her rights under the deed and allowed it to be physically altered in a way that might have led to her prejudice.

Thirdly, the separation agreement, though under seal, did not require a seal, for it was itself executed for valuable consideration, namely the undertakings not to take matrimonial proceedings and so on; therefore consideration was not required for a variation of that agreement.

[ORMEROD L.J. A variation of an agreement is a new agreement.]

Moulton-Barrett replied.

ORMEROD L.J. I will ask Upjohn L.J. to give the first judgment.

UPJOHN L.J. The question which falls for consideration is as to payments which are due from the husband to the wife under certain documents dealing with their separation. [His Lordship stated the facts set out above, and continued:] The effect of the supplemental memorandum, if it is enforceable, is to change the obligation of the husband from paying £30 a month less tax to the wife, into an obligation on him to pay £30 a month tax free, using that expression as meaning such a sum as after the deduction of tax should amount to £30.

The whole question that the county court judge had to decide, and that we have to decide, is whether that memorandum is enforceable or not.

It is submitted by Mr. Moulton-Barrett for the husband, who has said everything possible on behalf of his client, that there is no consideration for the memorandum executed in 1955 as it is not under seal, and that, therefore, the wife cannot sue under the memorandum and deed but only under the deed, in which case, of course, she is entitled only to £30 a month less tax.

The county court judge expressed his view in these words when he dealt with Mr. Moulton-Barrett's argument: "This "side of the case has given me anxiety, but the conclusion "I have reached is that if two parties to a document agree "that it does not correctly express their intentions and desire to "amend the agreement and put right an error or omission in "it, the creation of a newer and clearer document is thereby "made for a good consideration, that is, the removal of doubt. "Every variation of any agreement must at least be likely to "be more favourable to one or other party thereto. When two "people admit that any written agreement does not express "their true intention, there must surely be some consideration "for substituting a document which does so by expressing their "true intention instead of saying something else. The de facto "position—namely, that the husband as before was paying her "£30 clear—remained in any case unaltered after the memo-"randum was signed." I understand the judge to be expressing the view on the facts that he was satisfied that the parties had not in the original deed correctly expressed their intention, and that that intention was in fact correctly expressed in the supplemental memorandum. Mr. Moulton-Barrett has submitted that there has been no consideration for this memorandum; that it is a mere nudum pactum to pay an additional sum, that is, the tax due on each of the instalments. He has submitted that there was no doubt to be resolved, and that the judge was wrong in stating that the consideration could be the removal of a doubt. One must remember that the note of the judge's judgment was made some time later from the notes of others, and it may be that the exact language that he used is not before us. But it seems to me clear that all the judge is saying is this: There was a genuine doubt as to what the parties had originally intended, and they discussed the matter. The judge thought it was quite plain that the parties originally intended that the husband was going to pay a sum tax free, and therefore they entered into that agreement so as to resolve the doubts as to what the parties had intended. I accept at once Mr. Moulton-Barrett's argument that no doubt whatever arose on the effect of the original deed. The doubt which arose was whether the original deed in fact carried out their mutual intention.

Mr. Moulton-Barrett has further submitted that, in any event, the consideration was too nebulous to be enforceable. He points out that had the true intention originally been to secure that the wife was merely to have £30 a month spending money (as the husband said in evidence) and had rectification proceedings followed, the correct form of order in such proceedings would be an order whereby the wife was to get £30 a month after deduction of tax, but that she would undertake to pay to the husband any sums recovered by her from the income tax authorities. That may well be so.

The real truth of the matter is this. The original deed did not carry out the parties' intention, as the judge held. The wife could have made some claim to rectification. It may be, as I have just said, that the claim should be limited in some way. But she thought, and was advised, no doubt, that she had some right to obtain more than she was entitled to under the existing deed and she must have done that by means of a suit for rectification. Indeed, Mr. Moulton-Barrett has submitted that rectification proceedings ought to have been brought here. But the legal effect of what the parties did was that the wife believing that she had some good claim for rectification—I do not put it any higher than that—entered into an agreement with her husband to resolve that matter. The agreement they entered into, in those circumstances, is surely plainly an agreement for consideration. If some such document had not been signed by the husband in January, 1955, the wife would have been entitled to take rectification proceedings. Whether or not they would have succeeded does not matter, but on the evidence she had some prospect of success. But in order to compromise the matter they executed this agreement, which is not under seal, and it seems to me, in those circumstances, that plainly is a document executed for consideration.

I confess I have much sympathy for the husband, but the trouble arises not because he has been badly advised but because he has entered into this document without any advice at all. No doubt, had he been advised, he would have been warned of two matters: first, that his wife would under the document which he was being asked to sign get more than £30 a month spending money, and secondly that, having regard to his own financial position, he would himself have to account for some part of the tax notionally deducted by him from the annuity to the Inland Revenue. But, unfortunately, he was not advised on those two matters when he signed this document, and I am unable to come to any conclusion except that which the judge reached. This was an agreement made for consideration, namely, that the wife refrained from taking rectification proceedings. Accordingly I would dismiss this appeal.

ORMEROD L.J. I agree. There is nothing I wish to add except that I also share the regret which my brother has expressed.

WILLMER L.J. I also agree.

Appeal dismissed with costs.
Order for costs not to be enforced without the consent of the court.

Solicitors: *W. G. Street & Co.; Gerald Samuels & Shine.*

M. M. H.

[BRISTOL ASSIZES.]

1959
July 1.
Streatfeild J.

POPE v. D. MURPHY & SON LTD.

[1956 P. 933.]

Damages—Personal injuries—Life shortened—Damages to include wages which would have been earned during natural working life, notwithstanding injuries shorten life.

The plaintiff was injured in a motor accident and suffered injuries which shortened his expectation of life. In an action brought by him for damages for, inter alia, loss of future earnings, the defendants contended that damages under this head could only be based upon the expectation of life which was left to the plaintiff as a result of the accident:—

Held, that the proper approach to the question of loss of earning capacity was one which compensated the plaintiff for what he had in fact lost; that what he had lost in this case were prospective earnings for the remainder of his normal expectation of working life; accordingly, it was wrong to limit the damages for loss of future earnings to the period of the shortened expectation of life.

Harris v. *Brights Asphalt Contractors Ltd.* [1953] 1 Q.B. 617; [1953] 1 W.L.R. 341; [1953] 1 All E.R. 395 not followed.

[Reported by A. D. RAWLEY, Esq., Barrister-at-Law.]

Phillips v. *London & South Western Railway Co.* (1879) 5 Q.B.D. 78; (1879) 4 Q.B.D. 406; (1879) 5 C.P.D. 280; *Roach* v. *Yates* [1938] 1 K.B. 256; [1937] 3 All E.R. 442; and *Richards* v. *Highway Ironfounders* (*West Bromwich*) *Ltd.* [1955] 1 W.L.R. 1049; [1955] 3 All E.R. 205 considered.

ACTION.

On January 1, 1956, the plaintiff, Ivor Pope, was driving a motor-car on the road between Newport and Chepstow when a motor-vehicle, owned by the defendants, and driven by a man named Francis, crashed head-on into the plaintiff's car. As a result the plaintiff suffered severe injuries and his expectation of life was shortened. In an action for damages for personal injuries the plaintiff sued to recover, inter alia, loss of future earnings. At the trial the defendants contended, on the authority of *Harris* v. *Brights Asphalt Contractors Ltd.*,[1] that damages for loss of future earnings could only be awarded for the period of life which was left to the plaintiff as a result of the accident, and that he was not entitled to recover damages in respect of loss of wages which he would have earned during his natural life had it not been shortened by the accident.

The facts are stated more fully in the judgment.

N. R. Fox-Andrews Q.C. and *F. Cyril Williams* for the plaintiff. The tortfeasor here has reduced the plaintiff's expectation of life and now seeks to assess the damages for loss of future earnings on the shortened life. The plaintiff has suffered a loss in respect of the subsequent period; the loss of the opportunity to make a degree of provision for his dependants or to use the money in another way. The basis of this submission is that the plaintiff will make a less provision than he otherwise would have done.

[STREATFEILD J. The plaintiff has lost his earnings over a normal life. It is an existing loss. It is irrelevant what he might have spent those earnings on.]

The proper approach to the method of assessing the damages under this head is to consider what sum the plaintiff would have been likely to make during his normal life if he had not met with the accident: see *Phillips* v. *London & South Western Railway Co.*[2] and *Roach* v. *Yates.*[3]

Harris v. *Brights Asphalt Contractors Ltd.*[4] was wrongly

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[1] [1953] 1 Q.B. 617; [1953] 1 W.L.R. 341; [1953] 1 All E.R. 395.

[2] (1879) 5 Q.B.D. 78; (1879) 4 Q.B.D. 406, C.A.; (1879) 5 C.P.D. 280.

[3] [1938] 1 K.B. 256; [1937] 3 All E.R. 442, C.A.

[4] [1953] 1 Q.B. 617; [1953] 1 W.L.R. 341; [1953] 1 All E.R. 395.

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decided. See the criticism of that case in Kemp and Kemp on the Quantum of Damages, vol. 1 (1954), at p. 91. That passage is adopted as part of this argument. [Reference was also made to *Billingham* v. *Hughes*.[5]]

D. P. Croom-Johnson Q.C. and *J. C. Rutter* for the defendants. The loss of a man's income after he is dead is a loss suffered by his dependants and not by the man himself [Reference was made to *Williamson* v. *John I. Thornycroft & Co. Ltd.*[6]] The law compensates living people for losses suffered within their lifetime; in this case the loss is not an existing loss, nor would it be a loss vested in the plaintiff immediately before his death. Damages are not awarded on the basis of an annuity, partly because of the very contingency, which it is now known will happen, namely, the early death of the plaintiff. Reliance is placed on Slade J.'s decision in *Harris* v. *Brights Asphalt Contractors Ltd.*[7] *Phillips* v. *London & South Western Railway Co.*[8] was not a case of diminished expectation of life, nor was this point expressly dealt with in the summing-up by Field J. *Roach* v. *Yates*[9] was considered by Slade J. in *Harris* v. *Brights Asphalt Contractors Ltd.*[10] and he came to the conclusion that that part of the headnote in *Roach* v. *Yates*[11] which states that damages in respect of prospective loss of wages should be a sum which the plaintiff would have earned during what, but for the accident, would have been his normal life, subject to certain deductions, was not borne out by the judgments in that case. The basis on which such damages are to be assessed is not the plaintiff's inability to provide for his dependants: see *Richards* v. *Highway Ironfounders (West Bromwich) Ltd.*,[12] a decision of the Court of Appeal which approves the decision in *Harris* v. *Brights Asphalt Contractors Ltd.*[13] [*Benham* v. *Gambling*[14] was also referred to.]

Streatfeild J. On January 1, 1956, an appalling crash took place on the road between Newport and Chepstow. A Ford car driven by the plaintiff was negotiating a right-hand bend in the hours of darkness when the defendants' motor-car, driven by a man named Francis, came round what to him was a left-hand bend, obviously swinging out on to the wrong side of the road, and crashed head-on into the plaintiff's car. I was shown a picture of the damage, and the impact must have been quite terrific, just as terrific as the plaintiff's injuries have proved to be very serious.

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[5] [1949] 1 K.B. 643; 65 T.L.R. 246; [1949] 1 All E.R. 684.

[6] [1940] 2 K.B. 658; [1940] 4 All E.R. 61.

[7] [1953] 1 Q.B. 617.

[8] 5 Q.B.D. 78.

[9] [1938] 1 K.B. 256.

[10] [1953] 1 Q.B. 617, 630–632.

[11] [1938] 1 K.B. 256.

[12] [1955] 1 W.L.R. 1049; [1955] 3 All E.R. 205, C.A.

[13] [1953] 1 Q.B. 617.

[14] [1941] A.C. 157; 57 T.L.R. 177; [1941] 1 All E.R. 7, H.L.

Liability for this unfortunate crash, which cost Francis his own life, is now admitted. I indicated at an early stage that, in any event, the question of the plaintiff's special damage was likely to prove so complicated and to involve so prolonged an examination of the documents and accounts that it was obviously inappropriate to deal with that part of the case during the assize. Accordingly, I intimated, and counsel for both parties agreed, that it is the convenient course, that that part of the plaintiff's claim must be the subject of an inquiry into damages, either by an official referee or some other tribunal agreed by the parties. I am concerned to consider what is the proper figure for general damage which the plaintiff has suffered by reason of his serious injuries.

Mr. Fox-Andrews, on behalf of the plaintiff, has, I think, correctly analysed the position under different heads. First of all, the plaintiff is entitled to damages for his actual physical injuries. Secondly, for the pain and suffering which he has already endured —and be it noted that he has endured it already for something like three and a half years—and also for the pain and suffering which he is likely to have to endure in the future for such time as he may remain alive. Thirdly, damages for loss of the normal amenities and enjoyment of life. Fourthly, future medical expenses, as to which I have little evidence, and I have to do my best by way of what amounts almost to guesswork. Then I added a head of damage which Mr. Fox-Andrews accepted, that the plaintiff was entitled to claim for loss of expectation of life under the principles laid down in *Benham* v. *Gambling*.[1] The last head of damage is the one which has given rise to considerable controversy in this case, the appropriate figure representing the court's estimate of what the plaintiff would have earned for the rest of his working life but for this accident. That, in effect, is Mr. Fox-Andrews' submission, and I will deal with that later.

[His Lordship considered the first four heads and continued:]

Then there is the head of damage for loss of expectation of life, which, in my view, is quite a different thing from loss of future earning capacity. It is, within the principle of *Benham* v.

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[1] [1941] A.C. 157; 57 T.L.R. 177; [1941] 1 All E.R. 7, H.L.

Gambling,[2] simply the loss of enjoying a happy life. In accordance with that decision, it is, of course, not a head of damage which in these days demands a very high figure.

Mr. Fox-Andrews puts the last head of damage, namely, loss of future earning capacity, as the appropriate figure representing the court's estimate of what the plaintiff would have earned for the rest of his working life but for the accident. Mr. Croom-Johnson, on the other hand, contends that the court is only entitled to measure his loss of earning capacity by the amount of working life which is left to him.

[His Lordship considered the figures, and continued:]

Now the question is, over what period of time must his earning capacity be measured? Is it to be measured over the period of time during which he would have reasonably expected to work if there had not been an accident; or is it to be said that a wrongdoer, a tortfeasor, is enabled to say: "I have reduced your "expectation of life from, say, 20 years down to five. You are "entitled to a nominal sum for loss of expectation of life as such, "but with regard to your prospective loss of earnings, you are "only entitled to claim them over the period of time that I, the "wrongdoer, have left for you. You are not entitled to claim "in respect of the period which, but for my wrong, you would "reasonably have expected to earn that income"? If that indeed is the law, then I respectfully suggest that it would be very unjust, because, after all, the object of damages, as I understand them, is to do the best they can to compensate a man who has been injured, for what he has lost. What he has lost, as it seems to me, is not only the ability to earn £x a year, but the ability to earn it over that period of time that he might reasonably expect to.

Mr. Croom-Johnson has submitted to me, and I think rightly, that it is wrong to assess damages on a purely annuity basis, although that is very often rightly regarded as being the springboard, subject to adjustments. In the ordinary way, assuming that a man's expectation of life has not been reduced, the court makes up its mind what the man would be likely to earn over the period of time. It takes his earning capacity, his wages, his emoluments, and it may start by multiplying by the number of years over which he is likely to earn it, or, alternatively, by looking up the tables of expectation of life and seeing what is the sum, not as the final figure, but as the jumping-off-point. I agree with Mr. Croom-Johnson that it would be quite wrong to accept any annuity basis as the final figure, because I would then have to take into account that the plaintiff would be receiving in a lump sum what otherwise he would be receiving week by week, or month by month, over a long period of time, so there is a discount for that reason. I would also have to discount it because of the ordinary changes and chances of life. He might suffer some other accident or disaster, not by reason of any tort of the defendants but possibly by reason of somebody else's tort or by his own misfortune, or he might die. I would have to take all of those matters into account in discounting a figure which otherwise might have given him an annuity.

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[2] [1941] A.C. 157.

The result would be compensation for what the man himself had lost, that is to say, a reasonable figure for his diminished earning capacity over the period of time during which otherwise he would reasonably expect to earn it, having regard to all those changes and chances of life. But it is one thing to take into account those changes and chances of life, namely, his death or disablement by some other injury, and quite another thing to say that I must take into account the changes and chances of life brought about by this very accident, namely, the reduction of his earning capacity and his expectation of life. I am bound to say that that is how it appears to me. The question is, is that the law?

My attention has been drawn particularly to the judgment of Slade J. in *Harris* v. *Brights Asphalt Contractors Ltd.*[3] In that case Slade J., deciding this matter, came to the conclusion, for the reasons which he set out, that damages for prospective loss of earnings could only be based upon the expectation of life which was left to the man as a result of the particular injuries.

Mr. Croom-Johnson has relied upon that case and he has submitted to me, quite rightly, that the court does not compensate a dead man, and I agree that it does not. What I am here doing is to compensate a live man for what he has now lost. The question is, what has he lost? Has he lost whatever was his normal expectation of life, possibly 20 years, or is he only entitled to it over five or 10 years? The decision of Slade J., being at nisi prius, is not, of course, binding upon me.

There is a useful discourse upon this part of the law in Kemp and Kemp on the Quantum of Damages, vol. 1 (1954), beginning at p. 78. I think that the first case which has any bearing upon the

[3] [1953] 1 Q.B. 617; [1953] 1 W.L.R. 341; [1953] 1 All E.R. 395.

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matter is *Phillips* v. *London & South Western Railway Co.*[4] It was a case which was twice tried and it appears in other reports. At the first trial Field J., in directing the jury, said, amongst other things, this[5]: "Now how are you to deal with loss of future "income? . . . I say . . . that you are not to give the value of an "annuity of the same amount as the plaintiff's average income "for the rest of the plaintiff's life. If you gave that you would "be disregarding some of the contingencies. You must take all "things into consideration, and endeavour to see if you can what "is the proper mode of dealing with them. An accident might "have taken the plaintiff off within a year. He might have lived, "on the other hand, for the next twenty years, and yet many "things might have happened to prevent his continuing his "practice. If it had been a question of trade or business, bank-"ruptcy might have supervened. That does not come into "account here, and I only give it by way of illustration of what "must pass through your minds for the purpose of seeing what "sum is to be given. It is given, recollect, once for all, and "once only, you must not forget that, and it must be given "on the fairest estimate you can make of what the probable "continuance of the plaintiff's professional income would have "been." I draw attention to these words[6]: "The damages to "which a man is entitled are the consequences of a wrongful "act by which he suffers. The consequences of the wrongful "act here are undoubtedly that Dr. Phillips has been and is "prevented from earning such a sum of money as you think "he would have been likely to earn if this accident had not "happened." There is not a trace in that direction to the jury of an indication that the jury are only entitled to consider the income that the plaintiff would have earned during a shorter period of life.

In the Court of Appeal James L.J. in the same case said[7]: "That comes to this, you are to consider what his income would "probably have been, how long that income would probably have "lasted, and you are to take into consideration all the other "contingencies to which a practice is liable. I do not know how "otherwise the case could be put."

Then there was *Roach* v. *Yates*,[8] which Slade J. in *Harris's* case [9] analysed with great care. In *Roach* v. *Yates* Slesser L.J. said this [10]: "First, then, the plaintiff's loss of wages may be "noticed. Criticism has been made of the suggestion that one "method of estimating his loss under that head is to consider "what he would have earned during his life. Speaking for "myself, I see no justification for approaching that problem by "starting with the assumption that he would only have lived so "long as the accident has now allowed him to live." Those words seem to be the very reverse of Mr. Croom-Johnson's present submission. Slesser L.J. continued [11]: "I think the proper "way of approaching the problem is that which was followed in "*Phillips* v. *London & South Western Railway Co.*,[12] the leading "case on this matter—namely, first to consider what sum he "would have been likely to make during his normal life if he "had not met with the accident."

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[4] (1879) 5 Q.B.D. 78; (1879) 4 Q.B.D. 406, C.A.; (1879) 5 C.P.D. 280.

[5] 5 Q.B.D. 78, 81, C.A.

[6] Ibid. 82, C.A.

[7] Ibid. 87, C.A.

[8] [1938] 1 K.B. 256; [1937] 3 All E.R. 442, C.A.

So that at least Slesser L.J. in that case came firmly down on the side of *Phillips* v. *London & South Western Railway Co.*,[12] that the measure of damage is the probable income that the plaintiff would have had during his normal earning life, subject of course to the ordinary deductions in respect of the ordinary changes and chances of life. I have looked at the judgments of the other two members of the Court of Appeal, and, although they do not in terms state this to be so, it does not appear from their judgments that they are in fact dissenting in any way from the proposition of Slesser L.J. which I have just read.

Then came Slade J.'s decision, and my attention has been drawn to various criticisms which are respectfully made by the authors of Kemp and Kemp. The criticism of the authors of Kemp and Kemp, which is adopted by Mr. Fox-Andrews, appears at p. 91, and in my view is very forcible: "The first reason given is "that it cannot be right to award damages for loss of earnings "for a period during which ex hypothesi the plaintiff is not alive "to earn them. In earlier passages in his judgment Slade J. "expresses much the same sentiment when he speaks of 'imag- "'inary earnings' after the plaintiff's death. But all awards "for loss of earnings are in respect of imaginary earnings in the "sense that as a result of his injuries the plaintiff cannot earn "these earnings. It is the power to earn what he earned before "the accident which has been taken away from him. If he had "not been injured the plaintiff could reasonably expect to earn

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[9] [1953] 1 Q.B. 617.

[10] [1938] 1 K.B. 256, 268, C.A.

[11] Ibid. C.A.

[12] 5 Q.B.D. 78; 4 Q.B.D. 406, C.A.

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"money for the rest of his working life; his pecuniary loss is "that he cannot earn money for that period. Why should the "wrongdoer be freed from compensating the plaintiff for the "pecuniary loss which he has caused him just because, at the "same time, he has also shortened the plaintiff's life? Slade J. "speaks of restitutio being impossible in the sense that nothing "can lengthen the plaintiff's life by the period by which it has "been shortened by the accident. We entirely agree. But why "should not the wrongdoer make restitution where it is possible? "He can easily make restitution for the pecuniary loss which he "has inflicted on the plaintiff. General principles require that a "wrongdoer should compensate his victim for the injuries caused "to him, and that, where the injury results in a pecuniary loss "to the injured person, that person should be compensated in "full for such loss."

Unless there is good reason for my rejecting that criticism, I am bound to say for my part that I fully agree with it; because if I were to accede to Mr. Croom-Johnson's argument upon this, the result would obviously be that the tortfeasor here would be taking advantage of his own wrong and he would be saying: "I "reduced your working life to only five years, and you shall only "have compensation for those five years," quite forgetting that a much longer period was the true reduction in earning capacity.

Lastly, I have to consider *Richards* v. *Highway Ironfounders (West Bromwich) Ltd.*,[13] a decision of the Court of Appeal which is, of course, binding upon me. In that case Lord Evershed M.R., as it seems to me, was considering Slade J.'s judgment in *Harris* v. *Brights Asphalt Contractors Ltd.*[14] from an entirely different point of view. He was not considering the question of over what period of time, and the case did not concern over what period of time, a man might be losing his earnings; it was a case which was concerned entirely with whether a man could claim compensation in respect of his loss of opportunity of providing for his family, of saving for his family. On reading those pages of the judgment it does not appear to me that the matters of criticism which I have referred to in Kemp and Kemp, which prima facie strike me as being correct, were ever brought to the notice of the Court of Appeal or were ever considered by it. As it seems to me, *Richards* v. *Highway Ironfounders (West Bromwich) Ltd.*[15] is on quite a different point, and in so far as the Court of Appeal said, as the Master of the Rolls did say, that he thought that Slade J. had decided rightly, it seems that the rightness of his decision was from an entirely different point of view from that which is presented to the court in this case. I do not think, therefore, that *Richards* v. *Highway Ironfounders (West Bromwich) Ltd.*[16] operates as a Court of Appeal confirmation of the judgment of Slade J. Possibly the present case will give the Court of Appeal the opportunity of further considering it.

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[13] [1955] 1 W.L.R. 1049; [1955] 3 All E.R. 205, C.A.

[14] [1953] 1 Q.B. 617.

[15] [1955] 1 W.L.R. 1049.

Having regard to the criticisms of Slade J.'s judgment in *Harris* v. *Brights Asphalt Contractors Ltd.*[17] set out in Kemp and Kemp, not only in the passage that I have actually read, which seems to me to be the most forcible, I have come to the conclusion, with great regret, that I cannot find myself on principle in agreement with Slade J. In my view the proper approach to this question of loss of earning capacity is to compensate the plaintiff, who is alive now, for what he has in fact lost. What he has lost is the prospect of earning whatever it was he did earn from his business over the period of time that he might otherwise, apart from the accident, have reasonably expected to earn it. For that reason, therefore, I do not think that it is right for me to say, as Mr. Croom-Johnson invited me to, that the plaintiff's measure of damage can only be spread over a matter of five years or possibly a little more. I think that, apart from the accident and again, of course, subject to the ordinary changes and chances of life, he is entitled to claim damages over his normal expectation of life. If I were to hold anything else, I feel very strongly that I should be giving the tortfeasor here, the defendant, the benefit of his own wrong, and that I decline to do.

On those principles I have the very difficult task, as it always is, of assessing the damages under the different heads, and I feel that, in order that the parties may understand how I have set about it, it would be right for me to give separate figures for the different heads of damage on which Mr. Fox-Andrews has based his case.

I am not going to give a separate figure for the plaintiff's injuries, pain and suffering and loss of amenities; those I take all together. He has in fact endured this pain for three-and-a-half years, and according to Mr. Lucas he has certainly got to face another five years, possibly more; of course, he may be wrong and it may be less. For those three items, the figure of damages which

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[16] [1955] 1 W.L.R. 1049.

[17] [1953] 1 Q.B. 617.

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I fix is the sum of £9,500; for future medical expenses, the sum of £250. For loss of expectation of life under the principle of *Benham* v. *Gambling*,[18] £250. For the loss of earning capacity over the period of time that the plaintiff otherwise might reasonably have expected to earn, I fix the sum of £5,000. On the other hand, if I am wrong as to that last matter and Mr. Croom-Johnson is right, that last figure would have been £2,500 instead. But as it is, so far as this part of the case is concerned, that is, general damages, the total sum that I award is the sum of £15,000.

Judgment for the plaintiff.

Solicitors: *Wansbroughs, Robinson, Tayler & Taylor, Bristol; Cartwright, Taylor & Corpe, Bristol, for S. Garelick & Co., Cardiff.*

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[18] [1941] A.C. 157; 57 T.L.R. 177; [1941] 1 All E.R. 7, H.L.

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May 9, 10,
11, 12, 13,
16, 17, 26.

Paull J.

IVEAGH *v.* MARTIN AND ANOTHER.

[1956 I. No. 5655.]

Market—Toll—Mooring rights—Rights of "men and tenants" of manor of Bosham—Exemption from toll—Manor adjoining sea—Quay built on foreshore owned by lord—Used by defendant for boat repairs—Whether a man or tenant of the manor—Liability for toll for mooring boats and use of quay—"Toll"—"Man of Bosham."

Dock — Harbour — Quay — Mooring rights — Rights of navigation — Whether use of quay for business of boat repairing purpose incidental to navigation.

The plaintiff, the lord of the manor of Bosham, a manor of ancient demesne of the Crown, situate within the confines of the harbour and port of Chichester, owned a part of the foreshore adjoining the manor, a quay built thereon, a hard, and piles driven into the foreshore. A notice exhibited on the quay indicated the fees payable by the public for use of the quay and piles. The defendant carried on business as a boat repairer at Bosham, repairing yachts at the quay or beached on the hard and mooring boats at the piles. He claimed to have been born within the manor, and had lived for some years prior to 1954 on a motor cabin cruiser which was permanently moored to piles adjacent to the quay. His residence thereafter was unknown, but in 1958 he became a tenant of the plaintiff holding a lease of and occupying a house within the manor boundary. In 1953 he ceased to pay dues for mooring and

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refused to pay an annual sum then demanded of him by the plaintiff for the use of the quay and piles for his business. On August 31, 1956, the plaintiff purported to terminate the licence granted to the defendant and a company formed by him to use the quay and piles, giving seven days' notice to cease such user. The defendant and his company continued to use the quay and piles and the plaintiff brought an action to recover the balance of charges alleged to be due from them for the use of the quay and piles, for the mooring of boats and parking of motor-cars on the quay from September 29, 1953, to August 31, 1956, and an injunction to restrain them from using the quay and piles for any purpose.

The defendant, claiming to be a "man of Bosham" within the meaning of the Close Roll 11 Ric. II, m. 1, Letters Patent of Queen Elizabeth I and Letters Patent of James I, under which "men and tenants" of the manor were entitled, inter alia, to be "quit of toll throughout the realm," claimed to be entitled to free mooring rights in respect of any boats owned or used by him, alternatively to such rights by immemorial custom. Both he and the company also claimed that there was a public right to use the quay for all purposes incidental to navigation, including the repairing of boats, on payment of a reasonable fee; and, finally, that the period of notice to cease using the quay and piles for their business given by the plaintiff on August 31, 1956, was insufficient:—

Held, (1) that the phrase "men and tenants," as used in the Close Roll 11 Ric. II, m. 1, meant villein socmen and freeholders of the manor, and was subsequently extended to include tenants of the manor generally, but had achieved no wider meaning in the common law, and therefore the common law meaning of a "man of Bosham" must be limited to include only those persons who held land directly from the lord of the manor, and did not include other inhabitants of the manor; accordingly, the defendant was not a "man of Bosham" during the period to which the money claim referred (post, p. 262).

Case of the Town of Leicester for Toll (1585) 2 Leon. 190, and *Merttens* v. *Hill* [1901] 1 Ch. 842; 17 T.L.R. 289 considered.

(2) That as the defendant was now tenant of the manor under a lease held directly of the lord he was a "man of Bosham" at common law and was entitled to demand the rights, privileges and immunities attaching to such persons (post, pp. 263, 268).

Brimsgreen and Norton Manor, Coke's Institutes, vol. 2, pt. 2, 654 applied.

(3) That the word "toll" as used in the old documents relating to the manor must be interpreted, having regard to the fact that the manor was on the sea, to cover charges for bringing boats alongside any quay and landing any fish in so far as those goods might have helped, when the manor was a royal manor, in the supply of fish to the royal household, but that the right of a tenant of the manor to be quit of such toll was limited by the common law and applied only in respect of a boat owned by the tenant and used by him primarily for the purposes of his fishing (post, pp. 265, 266). The right to be exempt from toll for such purposes availed against the lord (post, p. 271).

Crew v. *Vernon* (1611) Moo.K.B. 818; *Goodson* v. *Duffield* (1612) Moo.K.B. 830; *Prideaux* v. *Warne* (1793) 2 Lev. 96; *Ward* v. *Knight* (1587) Cro.Eliz. 227 considered.

Truro Corporation v. *Reynalds* (1832) 8 Bing. 275 distinguished.

(4) That accordingly, in so far as the lord of the manor was concerned, the present right of a "man of Bosham" was permanently to moor a boat owned by him and used primarily for the purpose of his fishing on the foreshore, and to have a mud berth free of charge, and to use the quay without payment for the purpose only of embarking on to and disembarking from such boat, or of unloading fish from such boat and of placing fishing tackle on board such boat; and further to keep such boat moored to the quay for reasonably short periods, but not longer than a reasonable period between two consecutive tides if he decided to fish on each of such tides (post, p. 271).

(5) That the defendant had failed to prove a similar customary right in favour of any wider class of persons, and no lost grant in existence at A.D. 1189, giving such rights to some other class of inhabitants, could be assumed (post, pp. 271, 272).

(6) That the rights of navigation possessed by the public over all tidal waters, which included the right to anchor free of tolls to the owner of the foreshore (except in a port or harbour) did not include a right permanently to occupy a part of the water over the foreshore, even for the purpose of doing some act which incidentally assisted the navigation of others (post, p. 273).

Quaere, whether there was a public right to have a permanent mooring.

Gann v. *Free Fishers of Whitstable* (1865) 11 H.L.C. 192 applied.

Denaby and Cadeby Main Collieries Ltd. v. *Anson* [1911] 1 K.B. 171, C.A.; *Marshall* v. *Ulleswater Steam Navigation Co.* (1871) L.R. 7 Q.B. 166; *Attorney-General* v. *Wright* [1897] 2 Q.B. 318; 13 T.L.R. 480, C.A. considered.

(7) That, where the owner of a foreshore built thereon, at a place where there would otherwise be navigable water, a permanent building such as a quay, the public had the right (a) in a proper case to apply for a mandatory injunction ordering its removal if it interfered with their rights of navigation (which was not the case here) or (b) as a part of the rights of navigation, to land on or embark from any part of the land adjoining the foreshore on which they had a right to go and to go from such land to a vessel, and they were entitled, if that right was obstructed by the quay, to go upon it to obtain access from the vessel to that land and from that land to the vessel on payment of a reasonable toll (post, p. 273).

Eastern Counties Railway Co. v. *Dorling* (1859) 5 C.B.N.S. 821 applied.

(8) That, accordingly, the defendants were entitled to use the plaintiff's quay if it was the only reasonable way from a vessel which was in the course of being navigated to land upon which they were entitled to go or to go from that land on to the vessel, on payment

of a reasonable fee, but only in the course of embarking or disembarking or loading or unloading the vessel or while carrying out repairs thereto, provided that the vessel had arrived in the ordinary course of navigation and that such repairs were necessary to enable the vessel to resume her voyage; but they were not entitled to use the quay against the will of the plaintiff as a place of business for boat repairing as such use did not come within the usual incidents of navigation. Moreover, the defendants' rights were not increased by the fact that the quay was within the confines of a port (post, p. 275).

Allnut v. *Inglis* (1810) 12 East 527 applied.

(9) That the plaintiff had given the defendant and the company ample notice to cease using the quay and, accordingly, he was entitled to judgment for the amount claimed; but that an injunction would not be granted in the form claimed (post, p. 278).

ACTION.

The following statement of facts is taken substantially from the judgment: The plaintiff, the Rt. Hon. Rupert Edward Cecil Lee, Earl of Iveagh, was the Lord of the Manor of Bosham, a manor of ancient demesne, i.e., a manor which at the date of the death of Edward the Confessor was a royal manor. As was shown by the Quo Warranto Rolls, 1279 (7 Edw. I), and by the Close Roll, 1365 (9 Ric. II), the Lord of the Manor of Bosham enjoyed the liberty of wreck of the sea. That liberty carried with it the ownership of the foreshore since without that ownership the liberty could not be enjoyed. It followed that at the present day the lord of the manor owned the foreshore alongside which his manor ran, and which was situate within the confines of the harbour and port of Chichester.

The defendant, Edward Cecil Martin, belonged to an old Bosham family, having been born at 10, Mariners' Cottages, Bosham. Before 1939 he was a skipper of a private yacht, but since the 1939–1945 war he had been a marine engineer whose main work was the fitting out and repairing of yachts. He had no yard and had been accustomed to do his work on yachts while they were moored to a quay, known as Bosham quay, owned by the plaintiff as lord of the manor, or sometimes while the yachts were beached on a hard constructed by the plaintiff on the foreshore at the end of a lane known as Bosham Lane, which ran down to the foreshore a short distance away from the quay. At all material times the defendant owned a cabined motor cruiser *Invader*. The vessel was over 60 feet in length, and from 1949 to 1954 the defendant lived in her with his family. His residence between 1954 and 1958 was not known, but on March 7, 1958, he moved to Canute House, Fishbourne, a house on the manor of

Bosham, taking a lease from and becoming a tenant of the plaintiff as lord of the manor. *Invader* was at all material times usually moored to certain piles driven into the foreshore and running parallel to Bosham quay at such a distance therefrom that a plank could be used to go from the vessel to a boat which belonged to a sailing club and lay alongside the quay. The piles were the property of the plaintiff, having been driven into the foreshore either by him or by a previous lord of the manor.

On August 28, 1952, the defendant company, Pedlar Garage Ltd., of which the defendant was a director and shareholder, was formed. Prior to that date the defendant had been in partnership with another man, and during that time, and also in the early days of the company, *Invader*, according to the defendant, had been lent to the partnership or to the company for the purpose of doing certain towing work. During that period the defendant paid the dues demanded of him by the plaintiff for the right of mooring at the piles, regarding *Invader* as being, if not actual partnership or company property, property used by the partnership or the company. In 1953 such user ceased, the defendant's partner left and the company became a family company, the shares being owned by the defendant and his wife. *Invader* was thereafter used solely for private purposes and principally as living accommodation.

In 1954 the plaintiff considered that the defendant and his company ought to pay a reasonable sum in respect of their use of the quay for commercial purposes and proposed a payment of £100 per annum. The defendant objected to that proposal and took up the position that he would pay nothing, either for mooring *Invader* or for mooring any boat to the quay or for any other use of the quay, for example, for bringing lorries and cars onto the quay. He said he was a " Man of Bosham " and men of Bosham had the right to moor and use the quay free of all charge. As a result of the defendant's attitude, on August 31, 1956, the plaintiff's solicitors wrote stating that, unless the defendant and his company refrained from making any use of the plaintiff's quay and piles at Bosham in the future and gave a suitable undertaking in that respect within seven days, proceedings for an injunction would be issued, as well as for the amount alleged to be due from the defendant and the company. The defendant and his company continued to use the quay and piles, and the writ in this action was issued on November 9, 1956.

In the action the plaintiff claimed from the defendant or the company £68 13s. 6d. (which was amended during the course of the hearing to £48 19s.), being the balance of charges alleged to be due in respect of the mooring of boats to the quay and piles and the parking of motor-cars on the quay from September 29, 1953, to August 31, 1956, an injunction to restrain them from mooring or tying up boats to the quay and piles and from parking motor-cars or walking on the quay or committing any other act of trespass thereon or on the piles and from making any use whatever of the quay or piles. He relied on a notice which had for some years been exhibited on the quay indicating the fees payable in respect of the use by the public of the quay and piles and claimed that by the letter of August 31, 1956, any licence which the defendant or his company had enjoyed to use the quay and piles had been terminated.

By the defence it was contended that the defendant was a "Man of Bosham" and at all times and places entitled to cross any part of the foreshore on which the quay and piles were erected for, inter alia, obtaining access to or from any boat of his or being used by him on the grounds that by ancient custom existing actually or, alternatively, presumptively from time immemorial every man and tenant of the manor of Bosham had been and was entitled (a) freely to moor any boat belonging to him or being used by him anywhere in Chichester Harbour and on any part of the foreshore thereof and on or at any quay or piles on any part of such harbour or foreshore without payment of any charge to any person, and (b) freely to cross any part of the foreshore of Chichester Harbour and anything placed thereon for the purpose of obtaining access to or from any boat of his or being used by him without payment of any charge in respect thereof to any person, and (c) to the rights, privileges and exemptions set out in certain Letters Patent of Elizabeth I (the Bosham Writ) relating to the men and tenants of the manor of Bosham and Letters Patent of James I (the Bosham Charter) relating also to the men and tenants of the manor of Bosham.

He claimed to have been born within the boundaries of the manor of Bosham and of a freeholder of land within the boundaries and at all material times to have lived within the boundaries and been such a freeholder; further, that he was a "Man of Bosham" by virtue of section 28 of the Chichester Corporation Act, 1938,[1] and a certificate dated May 15, 1939, granted thereunder, and as such entitled to all the rights, privileges and exemptions accorded to all men and tenants of that which was ancient demesne of the Crown and in particular to the exemption of all "Men of "Bosham" from payment of all tolls or other thing for the carriage and/or passage of goods throughout the realm. Further or alternatively, both the defendant and the company claimed that there were public highways over the foreshore and the quay for all persons to go and return on foot and with horses and vehicles at their free will and pleasure and that the plaintiff was not entitled to exclude them from user of the quay or piles but only to charge a reasonable sum for the use thereof which the company had always been willing to pay. Finally they claimed that the seven days' notice to cease using the quay and piles given by the plaintiff in the letter of August 31, 1956, was insufficient having regard to the nature of their business.

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[1] Chichester Corporation Act, 1938, s. 28: "Notwithstanding anything "in this Act . . . the following pro- "visions shall apply and have effect ". . . :—(1) In this section—'Man "'of Bosham' means—(a) any person "who supplies the corporation with a "certificate signed by two justices of "the peace acting for the western "division of the county of West "Sussex . . . that he has established "to their satisfaction that he was

By his reply, the plaintiff contended that any rights, privileges or immunities (if any) which the defendant enjoyed as a "Man "of Bosham" were not exercisable within the manor and that any rights claimed by him under the Chichester Corporation Act, 1938, were ineffective as he did not at any material time earn a livelihood in fishing, yachting or boating in the port of Chichester.

R. E. Megarry Q.C., *Anthony Harmsworth* and *T. S. Legg* for the plaintiff. The plaintiff's title to the soil of the foreshore adjoining the manor of Bosham and the quay and piles built thereon is now admitted. It is common ground that Domesday Book records Bosham as a manor held of the Crown and in consequence it is a manor of ancient demesne. Tenants of ancient demesne are entitled to certain privileges. The claim of the defendant Martin to be a "man of Bosham" at common law amounts to no more than that he is a tenant of ancient demesne and entitled to the privileges of such a person.

The first question, therefore, is: Is he a "man of Bosham" at common law? If he is, the following questions also arise:

"born at Bosham in the said county "and prior to December 1, 1937, "earned a livelihood in fishing yachting or boating in the harbour; and "(b) any lineal descendant of any "such person who proves to the satisfaction of the corporation that he is "such a lineal descendant; so long as "any such person or lineal descendant "as aforesaid earns a livelihood in "manner aforesaid and resides in "Bosham; . . . (5) Nothing in this "Act affects prejudicially any right "privilege or exemption of any man "of Bosham conferred under or by "virtue of certain Letters Patent "granted in the fourth year of the "reign of H.M. King James I."

(a) Do the privileges of a "man of Bosham" still exist? (b) If so, do they include exemption from payment of toll to the lord within the manor? (c) If so, does that exemption extend to the payment of dues demanded by the plaintiff for the mooring of boats to the plaintiff's quay and piles?

Further questions also arise: Is the defendant Martin a "man "of Bosham" within the meaning of the Chichester Corporation Act, 1938? If so, what rights has he? What right has he, as a member of the public, over the quay and piles? If he has no right to use the quay and piles except by licence of the plaintiff, has the licence granted by the plaintiff been effectively revoked by the notice given on August 31, 1956? What rights, if any, has the defendant company to use the plaintiff's quay for the purpose of the boat repairing business?

As to the first question, it is submitted that the defendant Martin is not a "man of Bosham" at common law. He was not born within the manor itself, and at the material time he was not a tenant of the lord. A person who floats in a boat at the quay is not a tenant of the manor. The origin of the rights and privileges of "men of Bosham" at common law is to be found in a series of ancient grants. Under the first, dated A.D. 1189, Richard I granted the manor to John his Marshall and his heirs to have and to hold with all other its appurtenances hereditarily in fee farm of the King and his heirs "with soc and sac and "tol . . . with all liberties and free customs . . .": Carte Antique, C. 52/21. In 1279 the liberties in the manor, including soc and sac and wreck of the sea throughout the whole hundred and "to "be quit throughout the whole kingdom of stallage and toll . . ." were claimed by Roger le Bygod, Earl of Norfolk: Quo Warranto Rolls, 7 Edw. I, p. 755. On November 16, 1385, an order was made to suffer Margaret Mareschell, Countess of Norfolk, tenant of the manor of Bosham, "to enjoy the liberties and quittances "claimed by Roger le Bygod including quittances of stallages and "toll throughout the realm": Close Roll 9 Ric. II, m. 28. On June 18, 1388, an order was made to all sheriffs "to suffer all "men and tenants of Margaret Mareschell Countess of Norfolk "of the manor of Bosham . . . being ancient demesne of the "Crown to be quit of payment of toll and other customs upon "their goods, property and wares as they ought to be, and they "and their ancestors used ever heretofore to be time out of mind "as the said men etc. ought to be quit of toll, stallage . . . "throughout the realm": Close Roll 11 Ric. II, m. 1. Further orders of the same character were made on January 28, 1399, and January 27, 1401: see Close Rolls 1 Hen. IV, pt. 1, m. 19, and Close Roll 2 Hen. IV, pt. 1, m. 17. By the Bosham Writ, dated March 4, 1603, a document on which the defendant Martin particularly relies, it was ordered that "whereas by ancient "custom . . . the men and tenants of the ancient demesne of the "Crown of England are and ought to be free from all toll, pannage, murage, carriage and passage through our whole Kingdom "of England; . . . all and singular the men and tenants of "Bosham to be free from such toll, pannage, murage, carriage "and passage for their goods and things to be shown through our "whole Kingdom . . ." and by Letters Patent of James I granted in the fourth year of the reign—the Charter of Bosham—the same liberties were conferred on the men and tenants of the manor.

The rights and privileges of tenants in ancient demesne in relation to toll are summarised in Gunning on the Law of Tolls (1833), pp. 89 et seq. Scriven on Copyholds, 7th ed. (1896), p. 38, contains the most modern complete statement of a specialised book. See also Pease and Chitty on Fairs and Markets, 2nd ed. (1958), p. 58, as to the exemptions as to tolls and stallages given by the common law in favour of the lord of a manor of ancient demesne and his tenants. It is submitted that "toll" in relation to a manor of ancient demesne has a restricted and narrow meaning. All the books show that it applies only to the buying and selling of goods, i.e., tolls in fairs and markets, and not to payments required by a landowner for the use of his land. In the whole of Fitzherbert's Natura Brevium, where the writ of quit of toll is discussed, there is no reference to anything except the type of tolls referable to fairs and markets. In Tomlin's Law Dictionary, 4th ed. (1835), "toll" is dealt with under two heads, (1) Of Fair and Market Tolls, (2) Of Exemption from Fair and Market Tolls, and is defined as a payment in towns, markets and fairs for goods and cattle bought and sold, tenants of ancient demesne being discharged of toll throughout the kingdom for things which arise out of their lands or bought for manurance, etc., not for merchandise. That follows Coke's view: see Coke's 2nd Inst., Part I, p. 221, and the definition in Jacob's Law Dictionary, 7th ed. (1756). The plaintiff is entitled to pray in aid the fact that in Stroud's Judicial Dictionary (1953), vol. 4, p. 3043, there is no distinction between toll and tolnettum. In Coulson and Forbes on the Law of Waters, 6th ed. (1952), p. 632, the authors rely on Gunning on the Law of Tolls (1833), p. 1, and Coke's 2nd Inst., Part I, p. 58, and certain law dictionaries for their statements that toll, tolnettum and telagium are all terms of the same import, and signify, in a general sense, a sum of money paid by the buyer for exporting or importing goods and merchandise. It is submitted that "toll" cannot be construed as meaning a charge made for the mooring of boats to a quay.

Whatever the extent of the right to be free from toll, exemption could be claimed by the lord and by the tenants of the manor of ancient demesne, and not by any other persons within the manor. It is true that in the *Case of the Town of Leicester for Toll*,[2] Shute J. seems to have expressed the view[3] that an inhabitant of a manor of ancient demesne, though not a tenant, is entitled to the privilege, but the passages in Fitzherbert's Natura Brevium (1794 ed.), vol. 2, p. 228, which are substantially the same as those in the edition of 1581 on which Shute J. relied, do not support Shute J.'s statement. The true meaning of Shute J.'s words was that the privileges were not confined to freehold tenants but extended to any tenant who held at the will of the lord. It is a question whether the privileges of ancient demesne still exist. Tolls clearly are not obsolete: see *Attorney-General* v. *Colchester Corporation*.[4] But it may be that ancient demesne has been abolished: see Halsbury's Laws of England, 2nd ed., vol. 27, p. 588, and the Law of Property Act, 1922, s. 128 (3).

As the right to be exempt from toll applied both to the tenants and to the lord of the manor, it could not be a privilege against the lord and therefore the exemption of tenants could not apply within the manor itself. That proposition is supported by *Truro Corporation* v. *Reynalds*,[5] where it was held that an inhabitant of Truro who claimed exemption from "tollnet, passage, pontage, "murage . . . anchorage, stallage . . . tollage throughout our "whole kingdom of England except the City of London" under a charter of Elizabeth I, was not exempt from dues within the borough of Truro. The decision in that case was based on the language of the grant, and it is submitted that on that authority the court is entitled to construe the words "throughout the "realm" in the old documents on which the defendant Martin relies as "throughout the realm outside the bounds of the "manor." If freedom from toll does not apply within the manor, the defence of the defendant Martin that he is a "man "of Bosham" carries no weight.

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[2] (1585) 2 Leon. 190.

[3] Ibid. 191.

[4] [1952] Ch. 586; [1952] 2 T.L.R. 49; [1952] 2 All E.R. 297.

[5] (1832) 8 Bing. 275.

If he is not entitled as a "man of Bosham" to claim exemption from toll within the manor, then the plaintiff, who is admittedly the owner of the quay and piles, is entitled to make a charge for the use of his property and there is no limit to the charge he is entitled to make.

There can be no custom attaching to the use of the quay because it has not been in existence from time immemorial. It was constructed about 200 years ago. In those circumstances any rights claimed by the defendant Martin to the use of the foreshore cannot extend to the quay: see Gunning on the Law of Tolls (1833), s. IV, p. 122.

The defendants' contention that there is a highway over this quay cannot be substantiated. Land which forms a cul-de-sac ending in the sea is not a highway unless it can be shown that public money has been spent on its repair. No public money has been spent on repairing this quay and there is no evidence of dedication to the public by the owner. Even if, contrary to that submission, a highway does exist over the whole of the quay, that would not give the defendant and his company the right to moor boats at the quay free of charge in the course of their business.

As to the validity of the revocation of the licence granted by the plaintiff to the defendants to use the quay, the onus is on them to show that the period of notice was unreasonable. In the circumstances of the case, namely, the background of negotiations which had preceded the serving of the notice, and the period which elapsed before the issue of the writ in this action, the period of seven days was reasonable: *Winter Garden Theatre (London) Ltd.* v. *Millennium Productions Ltd.*,[6] *per* Lord Simon.[7]

John May for the defendants. The defendant Martin's claim to be a "man of Bosham" at common law is based on the fact that he is a "man or tenant" of the manor, which is a manor of ancient demesne, and as such he is, inter alia, entitled to be quit of toll throughout the realm. Reliance is placed on the ancient grants, in particular the Close Roll 11 Ric. II, m. 1, the Bosham Writ and the Charter of Bosham. That proposition involves the consideration of four questions: What is a man or tenant of ancient demesne? Is the defendant Martin such? What is the true nature and extent of the privilege of being "quit of toll"? Does the privilege operate within the manor?

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[6] [1948] A.C. 173; 63 T.L.R. 529; [1947] 2 All E.R. 331, H.L.

[7] [1948] A.C. 173, 191.

What constitutes a man or tenant of ancient demesne is a matter of common law and therefore the onus is neither on the plaintiff nor the defendant. The concept of a man or tenant of ancient demesne changed throughout the centuries as social conditions changed. It would not be right to ascertain what the rights of such a person were in A.D. 1189 and to apply that criterion through the succeeding eight centuries. Moreover, it must be borne in mind that almost all manors of ancient demesne were situate in the interior of the country whereas Bosham is, and always has been, on the sea. Its nautical flavour has to be taken into consideration in considering the rights and privileges attaching to the men and tenants of this particular manor. In considering the meaning of the word "tenant" one must be careful not to apply the modern conception of the word to tenures of earlier centuries when the incidents of tenure were very different. In manors of ancient demesne there were three kinds of tenants, namely, freemen, villeins and villein socmen, whereas in other manors there were only freemen and villeins: see Holdsworth, History of English Law, 4th ed. (1934), vol. 3, p. 264, and Halsbury's Laws of England, 2nd ed., vol. 27, p. 588. It was members of that peculiar class of tenantry, the villein socman, who held by ancient demesne and who, if disturbed in their holding, were entitled to sue out the Little Writ of Right Close to order the bailiffs to do full right according to the custom of the manor, and to the Writ of Monstraverunt for any infringement of that custom. Both writs were available against the lord of the manor as well as against the King. In later days true tenants in ancient demesne were equated with the freeholders: *Merttens* v. *Hill*, *per* Cozens-Hardy J.[8] [Reference was also made to Megarry & Wade's, The Law of Real Property, 2nd ed. (1959), p. 30.]

It is not suggested in this case that the defendant Martin was at the material time a tenant of the lord of the manor and thus a "tenant of ancient demesne," but it is submitted that he was an inhabitant of the manor, a person who lived regularly and permanently within the manor, and in those circumstances that he was a "man of ancient demesne" and thus entitled to the privileges accorded to such persons. Those privileges included the right to the Writ of Quit of Toll, which lay not only at the suit of the tenants but also of the other inhabitants of the manor: see Coke's 4th Inst. (1809), p. 269. The judgment of Shute J.

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[8] [1901] 1 Ch. 842, 853; 17 T.L.R. 289.

in the *Case of the Town of Leicester for Toll*[9] supports this submission. Authority for Shute J.'s statement that inhabitants as well as tenants were entitled to the privileges[10] is to be found in Fitzherbert's Natura Brevium (1584), vol. 2, p. 228B, where a difference is drawn between tenants and "every particular "person." It is submitted that "every particular person" means an inhabitant. Shute J.'s decision is referred to without disapproval in Holdsworth's History of English Law, 4th ed. (1934), vol. 3, p. 265, Gunning on the Law of Tolls (1833), p. 90, and Scriven on Copyholds, 7th ed., p. 39. See also the "History "of the Manor" by John Smyth (1637), p. 16, where there is a reference to the "inhabitants" of the manor being free from tolls. On those authorities, whether the defendant Martin is now a tenant of the manor or not (and he may be so because he now in fact holds a freehold of the lord), he was at the material time an inhabitant of the manor, and therefore a "man of ancient "demesne." The meaning to be given to the word "men" in the phrase "men and tenants" used in the old document is the meaning given to it by Shute J. in *Case of the Town of Leicester for Toll*,[11] and at any rate, in so far as Bosham is concerned, anyone who has a boat on the foreshore in which he lives permanently is an inhabitant of Bosham. This applies to the defendant Martin.

[PAULL J. If your submission is right the consequences may be startling.]

That is not necessarily so. Although it is true that a manor of ancient demesne retains its character as such even when granted to a subject, and that no subject can take away any of the rights or privileges attaching thereto, such rights and privileges can be taken away by statute. [Reference was made to Comyn's Digest, 4th ed. (1800), vol. 1, p. 474, Coke's 2nd Inst. (1809), Part II, p. 654, and Coke's 4th Inst., p. 270.] There is no doubt that Bosham was a manor of ancient demesne, and that it continues to be one today, so that any persons connected with it either as tenants or inhabitants are, if any can now be found, entitled to such of the privileges accorded to them by the common law which have not been taken away by statute, even if they have not relied on those privileges in the past. *Men of Brimsgreen and Norton*,[12] which is referred to in Coke's 2nd Inst.

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[9] 2 Leon. 190.

[10] Ibid. 191.

[11] 2 Leon. 190.

[12] (1308) 2 Edw. 2, Coram Rege.

(Part II), p. 654, although not a direct authority on this point is of persuasive authority.

It is conceded that if the word "men" as used in the old documents means only a tenant and not an inhabitant the defendant Martin did not come within the definition at the material time. The position may today be different because he now occupies as a freeholder a house within the manor.

As to the meaning of the word "toll," it is clear that in the early days, when there was not much movement about the country by sea, the usual franchise of toll and the most common case in which tolls were charged was in fairs and markets, but as time passed and civilisation increased and widened, a number of other similar franchises were granted, and the charges made thereunder were all properly called tolls. It would be wrong to restrict the meaning of "toll" to the meaning given to it in 1189 and apply that restricted meaning in 1960. On the authorities it has been applied throughout the centuries far more widely than in the restricted meaning it was given in 1189: see *Brett* v. *Beales*,[13] *Middleton* v. *Lambert*,[14] which concerned tolls charged for the passing of carts laden with ale and the passage of sheep over a bridge under a charter of George IV—in that case it was nowhere suggested that such charges could not be "tolls." See also *Gann* v. *Free Fishers of Whitstable*[15] and *Foreman* v. *Free Fishers and Dredgers of Whitstable*,[16] both of which concerned the right of the free fishers to take "toll" of boats anchoring. The Whitstable cases are of importance because Whitstable is by the sea as is Bosham. In *Foreman's* case,[16] which followed *Gann's* case,[17] it was held that "tolls of "merchandise" meant tolls for bringing merchandise on to the manor and also included anchorage tolls. Lord Hatherley L.C. clearly indicated that the claim of the Free Fishers to be entitled to take an anchorage toll was within the terms of the original grant of Edward I's reign. That grant was made in precisely the same year as the one in this case, and practically the same words were used. It would, therefore, not be right to say that when the word "toll" was used in 1279 its meaning was to be restricted to tolls in fairs and markets alone. "Toll" is a much more general term which must be given a wider meaning.

[Paull J. If it is established beyond doubt that the word

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[13] (1829) M. & W. 416.

[14] (1834) 1 Ad. & E. 401.

[15] (1864) 11 H.L.C. 192.

[16] (1869) L.R. 4 H.L. 266, H.L.

[17] 11 H.L.C. 192.

" toll " only meant fair and market tolls the fact that it acquired a wider meaning in later years cannot affect the matter.]

It is submitted that it can. The fact that toll may have been used to apply only to fairs and markets at a period when only that type of toll was in existence does not mean that the word has always to be given that restricted meaning. Certainly by the time of Elizabeth I there had been a widening in its meaning. In *Ward* v. *Knight* [18] the common law rule as to the privilege of a tenant of ancient demesne of being quit of toll was applied in precisely the same circumstances as the defendants contend it ought here to be applied in relation to Bosham. A toll must be properly considered as being the charge or money which is payable by a person exercising rights afforded to him by a franchise holder who has received a grant of that franchise from the Crown: Halsbury's Laws of England, 3rd ed., vol. 7, pp. 300–324. An analogy can be drawn with highways. Under the Road Traffic Acts " carriage " now includes motor-cars, but when the original Road Traffic Act was passed a carriage meant a horse and carriage. A right of way given for " carriages " under a long lease made at a time when carriages only meant horse-drawn carriages can nowadays be used by motor-cars. [Reference was made to Gunning on the Law of Tolls (1833), p. 16.]

As to whether or not the privilege to be free from toll can be claimed within the manor: if a man or tenant of a manor of ancient demesne was entitled to the Writ of Quit of Toll, and if that writ ran against the lord of the manor, then that man or tenant must be entitled to be quit of toll against the lord. It is fallacious to argue that because both lord and tenant were entitled to the privilege then the tenant is not entitled to rely on it against the lord because it would not be needed within the manor. Even if " toll " originally referred only to tolls in fairs and markets there was a market in Bosham, and by reason of their privilege the lord's tenants would be entitled to claim exemption in that market. *Truro Corporation* v. *Reynalds* [19] is clearly distinguishable because Truro was not a manor of ancient demesne. In such manors tenants rendered services to the King personally, and for that reason enjoyed their special privileges as a matter of common law. No manorial dues for building bridges or repairing or paying for the building of walls were ever demanded of them. All the services demanded of them were services certain, and they could not be increased either by the King or by any person holding under him. That continued to be so even if thereafter the manor was granted to a subject. As to the rights of tenants in ancient demesne, see Fitzherbert's Natura Brevium, vol. 1, p. 14, vol. 2, p. 288 A. B. C. D. E. and F.; Coke's 2nd Inst., Part I, p. 221; Gunning on the Law of Tolls (1833), p. 89; Holdsworth's History of English Law, 4th ed. (1934), vol. 3, p. 264; Scriven on Copyholds, 7th ed., pp. 38, 39; *Merttens* v. *Hill*[20] and *Hill* v. *Priour*.[21] The question asked in the *Truro* case[22]: "If the burgesses of Truro were not to repair the walls, who were?" could not be asked of the tenants of a manor of ancient demesne because they would never have been under any liability to repair walls, and that liability could not subsequently be put upon them. There is no doubt that where a particular body of persons already has an exemption from some liability, the Crown cannot create a liability contrary to that exemption. That proposition rests on the same principle as that a man cannot derogate from his grant.

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[18] (1587) Cro.Eliz. 227.

[19] 8 Bing. 275.

As to the defendant Martin's position under the Chichester Corporation Act, 1938, it is submitted that, accepting that the Letters Patent of James I—the Charter of Bosham—do grant some privilege, if the defendant Martin can show that he is one of the persons to whom the charter applies, and that he is also a man of Bosham as defined by section 28 of the Act, then by the combination of the charter and the Act he is entitled to claim the privileges accorded to such persons.

If the court comes to the conclusion on the authorities that at common law tenants of ancient demesne are only quit of tolls in fairs and markets, but that that limited privilege extends to inhabitants as well as to tenants, the defendant Martin is entitled to say that the Charter of Bosham goes much farther than the common law. What exactly the Crown is granting by such a charter is a matter of construction of the document: *Wood* v. *Haukshead*.[23] It is submitted that this charter grants quittance from toll, using that word in the wide sense. The Chichester Corporation Act, 1938, restricts the grant to some extent because it enables the corporation to make charges in relation to Chichester Harbour and narrows down the persons entitled to benefit under the charter; but, as far as this quay is concerned, which is not covered by the Act, there is no evidence before the court that before the grant of the charter any tolls were being taken for the use of it, or indeed whether the quay or piles were there at all. That being so, unless the court is satisfied that at the date of the charter the lord of the manor was, in fact, taking tolls and had the right to do so in respect of the quay, foreshore or piles, the freedom from toll given by the charter applies to tolls thereafter imposed for the use of the quay, foreshore or piles.

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[20] [1901] 1 Ch. 842.

[21] (1679) 2 Show.P.C. 34.

[22] 8 Bing. 275.

[23] (1602) Yel. 14.

[PAULL J. I have to see what rights the lord of the manor had at the date of the charter. The charter would not take away his rights.]

That is so, but even if he had the right to take tolls in fairs and markets the grant made under the charter would still give liberty of free carriage and passage.

[PAULL J. Subject to Mr. Megarry's addressing me, I am inclined to think that at common law and under the charter the defendant Martin may have established a right only to the extent that each tenant of the manor of Bosham holding directly from the lord has a right in respect of one boat owned by him personally and used primarily for fishing to moor at any pile or buoy erected on the foreshore by him personally, but not so in respect of the use of the quay or hard belonging to the lord. As to custom, the evidence may establish that any inhabitant of the parish of Bosham born in Bosham whose father and grandfather were born and lived in Bosham has the same right as tenants of the manor, and also has the right temporarily to moor alongside the quay known as Bosham Quay, but not for any longer period than would be reasonably necessary to land and take home any fish caught, or to place on board any tackle, and only for such period as may be necessary to fish at two following tides. That right would be restricted to one boat for each household.]

In so far as landing a catch of fish is concerned, as distinct from a cargo, the lord of the manor does not appear ever to have called for a toll. That is clear from the lease of 1851 and the Table of Tolls and Harbour Dues, 1901. Therefore it is submitted that there is no need for the customary exemption to be limited to a mere catch of fish per inhabitant.

[PAULL J. Are you asking me to find as a custom that because a man is a man of Bosham he can own a fleet of 20 schooners and claim exemption from toll everywhere in England on all of them?]

That may be a possible consequence, but custom is immemorial and at the time this custom was established no one owned 20 boats. It is not contended that the custom extends beyond Chichester Harbour, but it would be wrong to restrict its operation to fishermen only. In the olden days the inhabitants of Bosham were primarily concerned with fishing, but if they were in fact entitled to exemption in respect of a boat the fact that changing circumstances have resulted in that boat being more likely to be a yacht than a fishing boat is no reason for so limiting the custom. Moreover, there is evidence that ships carrying corn and gravel came into Bosham and were exempted from toll. As to the extent of the custom, it is submitted that any person who resides in Bosham as a matter of reasonable regularity and who earns his living in connection with the sea, and who is at least third generation, is entitled to the benefit. A mere builder of engines is not so entitled, but a person who has his own boat in the harbour and who works on other people's boats afloat—who earns his livelihood directly in connection with boats afloat in the harbour—is entitled to the benefit.

As to the claim for an injunction, it is submitted that the defendants, as members of the public, are entitled to use the foreshore for purposes incidental to the rights of navigation, and no lawful distinction can be drawn between the foreshore and some structure the plaintiff has put upon it. Any building built upon the foreshore becomes a part of it. Purposes incidental to the rights of navigation include, inter alia, the right to tie up boats to a quay for the purpose of having repairs done, subject to this, that in exercising his rights, no member of the public may unreasonably obstruct the rights of other members of the public, and subject also to the payment of a reasonable toll to the owner of the foreshore. Moreover, the public are entitled to obtain access to their boats so tied up over any part of the foreshore which they have by usage been accustomed to use and, in particular, to obtain access from the extremities of any rights of way abutting on the foreshore.

[Paull J. If there is an obstruction on the foreshore it might lead to an action by the Attorney-General on behalf of the public, but if there is no obstruction how can action be taken? Is it right for me to make a declaration that there is no right in any member of the public to use the quay in a normal manner?]

When it is a question of upholding a public right the same principles apply whether it is a question of asking for something to be removed or for the right to go on someone else's land: *Attorney-General* v. *Wright*[24]; *Lyon* v. *Fishmongers' Co.*[25];

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[24] [1897] 2 Q.B. 318; 13 T.L.R. 480, C.A.

[25] (1875) L.R. 10 Ch. 679, C.A.; (1876) 1 App.Cas. 662, H.L.

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Marshall v. *Ulleswater Steam Navigation Co.*[26] In the last cited case it was held that the right to pass and repass over a pier was one of the necessary incidents of navigation on Ulleswater Lake. If the defendants can show that repairing boats is a necessary incident of navigation, that work may be done on the quay. It is submitted that the rights incidental to the rights of navigation to which the public are entitled include the right of waiting to load cargo, or to complete repairs, and that extends to tides or even a season. Repairs are not only those made necessary by storm or tempest: *Denaby and Cadeby Main Collieries Ltd.* v. *Anson*,[27] *per* Fletcher Moulton L.J.[28] The defendants, as the agents of the owners of boats to be repaired, have the right to use the harbour for that work. So far as the foreshore is concerned, the public have rights of navigation which extend to the quay and piles. Those rights include the right to tie up boats at the quay and piles. The public also have the right to pass over the public right of way to get on to the foreshore, and, as the public right of way ends at the quay, to go over the quay subject to the payment of a reasonable toll to its owner. This is a port in a harbour where there is tidal navigable water. The Crown originally held the foreshore subject to the rights of the public. The grantee from the Crown takes subject to those rights. [Reference was also made to *Blundell* v. *Catterall*[29] and *Lord Falmouth* v. *George*.[30]]

In the circumstances of this case seven days' notice given to the defendants to cease using the quay was not reasonable.

Megarry Q.C. in reply. The Charter of Bosham adds nothing to any rights granted to "men of Bosham" at common law. It merely recites and confirms the privileges already enjoyed. That is implicit in the language of the charter.

As to the reasonableness of the length of notice, the general principle of law is laid down in *Minister of Health* v. *Belotti*,[31] and this applies here. That case was decided before *Winter Garden Theatre (London) Ltd.* v. *Millennium Productions Ltd.*,[32] but although cited in argument, no reference was made to *Belotti's* case[33] in the speeches of their Lordships in the *Millennium* case.[34] It is true that in the latter case the views expressed on the notice were not necessary to the decision, but reliance is placed on the observations of their Lordships to the effect that notice which, if taken alone, might be insufficient is sufficient if a packing up period of reasonable length is allowed. That was certainly the case here. There is no evidence of circumstances that made the notice too short.

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[26] (1871) L.R. 7 Q.B. 166.

[27] [1911] 1 K.B. 171, C.A.

[28] Ibid. 200.

[29] (1821) 5 B. & Ald. 268.

[30] (1828) 5 Bing. 286.

[31] [1944] K.B. 298; 60 T.L.R. 228; [1944] 1 All E.R. 238, C.A.

[32] [1948] A.C. 173.

[33] [1944] K.B. 298.

[34] [1948] A.C. 173.

[PAULL J. I am bound by the decision of the Court of Appeal in *Minister of Health* v. *Belotti*[35] if it has not been expressly overruled.]

The defendants are not entitled to claim a prescriptive right of any kind because no such right has been pleaded. As to the custom contended for, no authorities have been cited by the defendants in support of their proposition. All the learning was collected in *Hammerton* v. *Honey*,[36] which is cited in Halsbury's Laws of England, 3rd ed., vol. 11, p. 169, as the only authority on custom. Custom must be reasonable. It must have existed continuously from time immemorial; it must be local; and it must be strictly proved. There is a distinction between custom and usage: Halsbury's Laws of England, 3rd ed., vol. 11, p. 183. In order to succeed, the defendants must prove a custom existing in 1189 entitling inhabitants of Bosham to tie up their boats to this quay. That they cannot do. The evidence as to the age of the quay is not explicit, but the plaintiff's submission rests on the inherent improbability that it would have been in existence in 1189. There is no evidence that it was in existence at that date, but there is some evidence that the quay is a modern one. On the preponderance of probabilities the court should find that the quay was not in existence in 1189. Moreover, there is no real evidence of the custom claimed. It is plain that the common law "man of Bosham" has some rights and it may be that they have become confused over the centuries with custom, but it is exceedingly difficult for the defendants to show that there is a custom conferring rights on a wider class of persons similar to the rights of the men of Bosham but confined to Chichester Harbour. The evidence as to the exact ambit and existence of a custom was extremely shadowy and it is submitted that the custom contended for has not been established.

As to the rights claimed by the defendants as members of the public, if their submission is right it would mean that the moment anyone erects a quay in Chichester Harbour the public immediately obtains rights over it. The true rule is that where a

[35] [1944] K.B. 298.

[36] (1876) 24 W.R. 603.

person erects on the foreshore something that interferes with existing public rights, the Attorney-General can take steps to have it removed; but there is nothing to prevent the owner of the foreshore erecting a structure such as a quay thereon provided that the rights of the public are not injured thereby. There is no question of interference with the public rights here. It cannot be said that everything put upon the foreshore is a nuisance. [Reference was made to *Denaby and Cadeby Main Collieries Ltd.* v. *Anson*[37]; Moore, History and Law of the Foreshore and Seashore, 3rd ed. (1888), pp. 355–360; Coulson and Forbes on the Law of Waters, 6th ed. (1952), p. 26.] As to rights incidental to the rights of navigation, every ship has a right to go on the sea, but every ship has not the right to tie up in a port. The mere fact that a harbour is a port does not give members of the public the right to tie up their boats to a quay erected therein.

[PAULL J. Has not every navigator the right to tie up to the physical structures in the harbour at Chichester? He has the right to drop anchor there.]

As to the rights relating to ports, see Gunning on the Law of Tolls (1833), p. 116. The grant of a royal franchise of a port does not override the private rights of owners of property therein. It gives to the owner a right which he would not otherwise have had.

There is no rule of law that anyone who puts any structure on the foreshore gives every member of the public the right to tie up his boats at it. *Denaby and Cadeby Main Collieries Ltd.* v. *Anson*,[37] on which the defendants relied to show that the right to tie up at a quay is one of the incidents of the rights of navigation, goes a long way to show that it is not. It is for the defendants to show that whatever structure the owner of the foreshore puts up within the confines of a port the public has the right to tie up boats at it. Rights of navigation do not include the right of a boat to ground on a bank and occupy it for an indefinite period: *The Carlgarth*,[38] *per* Scrutton L.J.[39] Grounding a boat is not one of the ordinary rights of navigation; nor is the right to run into a foreshore. [Reference was made to *Denaby and Cadeby Main Collieries Ltd.* v. *Anson*, *per* Fletcher Moulton L.J.,[40] and *Attorney-General* v. *Wright*, *per* Lord Esher M.R. and A. L. Smith L.J.[41]] Where artificial structures such as a pier or quay are built on the foreshore, the public has no right to go upon them except in so far as a right to do so is given by the owner. *Liverpool and North Wales Steamship Co.* v. *Mersey Trading Co. Ltd.*[42] is conclusive on that point. The public has no rights over the foreshore itself except those which are well known and clearly defined: *Lord Fitzhardinge* v. *Purcell*,[43] *per* Parker J.[44] In any case a man's right to tie up his own boats at a quay would not allow him to use the quay for repairing the boats of others.

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[37] [1911] 1 K.B. 171.
[38] [1927] P. 93.
[39] Ibid. 107.
[40] [1911] 1 K.B. 171, 198.
[41] [1897] 2 Q.B. 318, 321, 328.

Where a charge is based on the ownership of soil there is no limit to the charge which the owner can make; and he can keep whom he pleases off his land: *Attorney-General* v. *Colchester Corporation*.[45] There is a sharp distinction between tolls based on royal grant, such as tolls in markets, and charges to use someone's soil. Nothing has been said here to attack the reasonableness of the charges made by the plaintiff.

As to the common law man of Bosham, there are three main areas of dispute, (1) who gets the privileges attached to such a person, (2) what are the benefits, and (3) whether the benefits extend within the manor.

[PAULL J. I am inclined to think that the expression "man of "Bosham" is confined to tenants of the manor holding directly of the lord.]

There is no specific authority outside the general statements in the books regarding the right of a lord of the manor to demand tolls within the manor itself. In Pollock and Maitland's History of English Law (1923), vol. 1, p. 383, which goes back to Vinogradoff, Villainage in England (1892), p. 89, a distinction is drawn between the rights of lords and tenants against the outside world and the liabilities of tenure. Exemptions from toll come within the class which deals with the rights of lord and tenants against the outside world. As to the type of benefit, see Scriven on Copyholds, 7th ed. (1896), p. 39. Fish cannot be produce of the manor: Coke's 4th Inst., p. 269; Comyn's Digest, 5th ed., p. 609, under the title "Ancient Demesne."

As to the analogy which the defendants have attempted to draw between a waterway and a highway, the plaintiff fully accepts that an easement of way for carriages granted when carriages were horse-drawn would include a horseless carriage, but it would not embrace a hovercraft.

The *Truro* case[46] admittedly applied to a different type of grant, but it is not conceded that it is irrelevant; that decision supports the plaintiff's submission, because if exemption from tolls did not apply within the borough where there was an express grant a fortiori it must apply here where the rights are based on common law.

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[42] [1909] 1 Ch. 209; 25 T.L.R. 89, C.A.

[43] [1908] 2 Ch. 139; 24 T.L.R. 564.

[44] [1908] 2 Ch. 139, 167.

[45] [1952] Ch. 586.

[46] 8 Bing. 275.

Section 27 of the Chichester Corporation Act, 1938, cannot be immediately nullified because section 28 begins "notwithstanding "anything in this Act." Effect must be given to both sections. The effect of the Act was to recognise the rights of "men of "Bosham" at common law which remained at the time the Act was passed.

John May for the defendants. The plaintiff's argument on the question of custom is fallacious. The fact that this quay was not in existence in 1189 is not sufficient to dispose of the presumption that boats were coming into the harbour and tying up to some facility which was in existence in those days. The onus is on the plaintiff to disprove the custom and he has not discharged it.

[PAULL J. If you are to prove custom you must give evidence that something has been happening from time immemorial. Evidence that some act is founded on a charter is not evidence of custom.]

Although men of Bosham may have had their attention directed to the Charter of James I it is known that there was a Writ of Bosham issued in the time of Elizabeth I which was in similar terms and which itself refers back to earlier grants. In *Hammerton* v. *Honey* [47] usage is evidence of the exercise of a right from time immemorial. If there is evidence of user it is for the court to say whether that user must be presumed to be based on some form of legal grant made prior to 1189, and it should so presume unless the contrary is proved, particularly in a case such as this where the charter on which the defendants rely is not the earliest charter. The defendants make no wider claim than that the custom related only to Chichester Harbour. Evidence of usage might only be expected to relate to fishing boats because that was the purpose for which the boats were then primarily used, but the custom claimed must be deemed to have attached to the boat whether it was used for fishing or not.

The decision in *The Carlgarth* [48] depends on its facts, which were quite different from those here. Bankes L.J.'s judgment proceeds almost entirely on a question of fact. It is not disputed that the right to ground is not an ordinary incident of navigation, but when grounding is an essential part of an act of mooring it is an incident of navigation. "Riparian" is used by Baukes L.J. in *The Carlgarth*[49] strictly in describing land that is not foreshore. Coming into port is one of the special circumstances where there is a right to ground. In *Liverpool and North Wales Steamship Co. Ltd.* v. *Mersey Trading Co. Ltd.*[50] the question of the rights of the public over the foreshore qua foreshore was never argued and that case has no application to the facts of the present case; it was argued purely on the statutory question; it is no authority on what the public common law rights of the plaintiffs were. The question in *Lord Fitzhardinge* v. *Purcell*[51] was whether there was a public right to shoot wild fowl over a manor, and it is not surprising that that was found not to be one of the ordinary incidents of navigation.

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[47] 24 W.R. 603.

[48] [1927] P. 93.

In the present case the court has to consider separately the rights over the mud, the piles and the quay. If it be held that the quay is private property and that the defendants have no right to go upon it, the same may not apply to the piles and the mud. The right to put down moorings in someone else's mud is an ordinary incident of navigation which can prima facie be done without charge unless the owner can show that he has provided services such as groynes, buoys, etc., or that it is a port: see *Gann* v. *Free Fishers of Whitstable*[52]; *Foreman* v. *Free Fishers and Dredgers of Whitstable*[53] and *Attorney-General* v. *Wright*,[54] where Lord Esher M.R. distinguished *Foreman's* case[55] from *Gann's* case[56] on the ground that in *Foreman's* case[57] it had been proved that Whitstable was a port, and therefore there was a right to charge for a mud berth but no right to prevent anchorage. There is an a fortiori case in regard to piles, because the owner has put them into his own land for boats to moor at. If it is not a trespass to put down moorings into someone else's land it cannot be a trespass to moor to a pile put into the land by the owner for boats to moor at.

Cur. adv. vult.

May 26. PAULL J. read the following judgment, in which he stated the facts, said that he was doubtful whether the reason given by the defendant for paying dues for mooring *Invader* up to 1953 was the true reason and was inclined to think that up to 1954 it had never occurred to him that he had any right to refuse to pay dues, but that that fact did not affect his right to refuse, if he had that right. His Lordship continued: The apparently simple claim by the defendant, that he claimed rights as a man of Bosham, has resulted in a trial of seven days' duration, the great majority of that time being occupied in trying to ascertain what is a "Man of Bosham" (if he exists) and what are his rights (if any). In addition, the question of public rights in relation to the quay and foreshore have had to be argued, and also the question whether the notice was a reasonable one. There is no suggestion that the defendant company can be a "Man of Bosham," but both defendants claim that in any event they cannot be prevented from mooring vessels to the quay or piles or foreshore, or otherwise using the quay, on payment of reasonable sums in respect of such use. On all these questions no less than 43 textbooks, cases and other authorities were examined during the hearing. I am greatly indebted to counsel for their learned and careful arguments.

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[49] [1927] P. 93, 107.

[50] [1909] 1 Ch. 209.

[51] [1908] 2 Ch. 139.

[52] 11 H.L.C. 192.

[53] L.R. 4 H.L. 266.

[54] [1897] 2 Q.B. 318.

[55] L.R. 4 H.L. 266.

[56] 11 H.L.C. 192.

[57] L.R. 4 H.L. 266.

I start with a short description of the geographical features which have a bearing on the case. Bosham is situated on Bosham Channel. Bosham Channel is an arm of the sea running off from Chichester Channel, which in its turn is an arm of the sea which, together with Emsworth Channel, enters from the sea through a comparatively narrow channel bounded by Black Point and East Head. These channels (together with Thorney Channel, which also runs inland off Chichester Channel) form a large area of almost land-locked water, the whole area being known as Chichester Harbour. Chichester Harbour is one of the ports of England and is officially known as the port of Chichester. Bosham and Bosham Channel are, therefore, within the port of Chichester. Bosham Channel at Bosham itself almost dries out at low water, uncovering a very considerable area of foreshore. It is, however, agreed that the channel is navigable to a point past Bosham at all states of the tide. It is admitted by the plaintiff that both Bosham Quay and the hard have been built on this foreshore. The quay is built more or less alongside a very narrow branch of the small permanent channel. The shape of the quay and the way it runs can be seen on two maps, the latter showing that if anyone on the quay walks or motors across the bridge at one end of the quay he at once and without let or hindrance comes onto a road built on the foreshore and known as Shore Road. Although this road is on the foreshore and covered at high tide, it is agreed that the road is a public road. Bosham Lane can be seen running down towards this road. The hard, to which I have referred, has been built between Shore Road and where Bosham Lane ends at the foreshore. I mention Shore Road as an argument was adduced by Mr. May for the defendants founded on the fact that a public road runs to the beginning of the quay.

Running parallel with Shore Road, but of course off the foreshore, is a row of cottages known as Mariners Cottages. These cottages are some way to the east of Bosham Lane. The defendant was born at No. 10. No. 10 is not now, and at no material time has been, a part of Bosham Manor. On an old map of the manor dated 1801 Mariners Cottages are on the land marked "glebe land" and No. 10 is about 400 feet from the nearest land of the manor. Any claim by the defendant based on his being born on the manor would, therefore, fail.

For how long the quay or a quay has stood on the present site is quite unknown. The present steward of the manor described the quay as being modern, having been re-surfaced and re-sided. An old building known as the Rap Tackle on the quay is at any rate 100 years old, and the old map of the manor shows the channel running to where the quay stands marked "Dock and "Quay." There is also on that map a little to the north of that channel an outline partly dotted jutting over the foreshore called "Old Quay." That some form of landing place existed either at or quite close to the site of the present quay from a very early date I should think is almost certain. In so far as it is for the plaintiff to show that there was no quay, or a landing place the equivalent of a quay, there in A.D. 1189, he has failed to prove that fact.

The claim by the plaintiff is twofold: (1) a claim for £48 19s. for fees incurred by the defendants or due to them; and (2) a claim for an injunction against the defendants restraining them from using the quay or the piles in any way for any purpose.

It is necessary to analyse to some extent the money claim, although I am not required to analyse the amount of each fee. I should state, therefore, that the fees can be divided into the following categories: (a) fees claimed in respect of boats (the *Invader*, a motor tender and a dinghy) owned by the defendant and tied up to the piles or the quay; (b) fees claimed for the use of the quay by hoisting a yacht, not belonging to the defendant or the company, onto the quay itself for the purpose of repair (this is claimed against both defendants, in the sense that the plaintiff says one or other is liable); (c) fees claimed for the use of the pier by a motor-car and possibly a lorry brought onto the pier (whether the motor-car was used in the business or as the defendant's personal car I do not know); and (d) a charge of 1s. for a "mud berth" on the foreshore used at some time by the *Invader*. So far as (a) and (d) are concerned, the defendant claims that he is under no liability to pay anything, as he has the right of free mooring; and so far as (b) and (c) are concerned, the defendant and the company say they have the right so to use the quay on payment of a reasonable sum.

I start by considering the phrase "a Man of Bosham." First, is there such a person as a "Man of Bosham" at common law? If so, who is he and what are his rights?

When the Chichester Corporation Act, 1938, was before the House of Lords as a Bill, a petition was presented against the Bill. One of the petitioners, who is now dead, was the quaymaster of Bosham Quay. Clause 9 of the petition states that the petitioners are fishermen and they represent a number of persons and families most of whom have resided for generations in the ancient community of Bosham and whose livelihood has been earned in Chichester Harbour. Clause 10 states: "Your "petitioners and in many cases their forefathers have been "accustomed to place in Bosham Channel a number of moorings "consisting of anchors, cables and floats for the purposes of "mooring their vessels. Your petitioners have never paid for "mooring charges for their vessels and they claim that they have "acquired or have had handed down to them hereditary or pre-"scriptive rights of free mooring." I need not, I think, refer to any other part of the petition, except to say that the petitioners in effect petitioned the House to secure the recognition of their rights (inter alia) to free mooring.

The phrase "Men of Bosham" does not appear in the petition, but, no doubt as a result of what happened on the petition being heard, in section 28 of the Act a "Man of Bosham" is defined, and that person is given certain rights as against the Chichester Corporation. During the argument in this case the convenient phrase "a statutory Man of Bosham" has been used with reference to such an individual. A "Man of Bosham" is defined in the Act as a person who supplies the corporation with a certificate from two justices of the peace that he has established that he was born at Bosham and, prior to December 1, 1937, earned a livelihood in fishing, yachting or boating in Chichester Harbour or is a person who proves that he is a lineal descendant of such a person. A person, however, only remains a "Man of Bosham" for the purposes of the Act so long as he earns a livelihood by fishing, yachting or boating in the Harbour of Chichester and resides in Bosham. Section 28 (5) enacts that nothing in the Act affects prejudicially any right, privilege or exemption of any "Man of Bosham" conferred under and by virtue of certain Letters Patent granted in the fourth year of the reign of King James I. This document is the Bosham Charter, to which I shall refer later. Section 27 of the Act expressly enacted that nothing in the Act should adversely affect any rights of the Lord of the Manor of Bosham in respect of the foreshore, the quay or the harbour.

I have no hesitation in saying that the phrase "a Man of "Bosham" has been known for many centuries as a phrase used to cover persons who enjoyed particular rights not enjoyed by those who did not come within that phrase; but, quite apart from the matter of a certificate, I have no hesitation in saying that the definition of "a statutory Man of Bosham" is not a definition which can be attached to the title at common law.

As long ago as 1388 there is a reference to the men of Bosham. In the Close Roll of that year (11 Rich. II) there appears this entry: "Order to suffer all the men and tenants of Margaret "Mareschall Countess of Norfolk of the manor of Bosham County "of Sussex . . . to be quit of payment of toll and other customs "upon their goods, properties and wares as they ought to be and "they and their ancestors used ever heretofore to be for time out "of mind; as the said men etc. ought to be quit of toll, stallage, "cheminage, portage, pavage, murage and passage throughout the "realm." From then onwards the phrase "men and tenants" appears in many documents (see Close Roll 1 Hen. IV; Close Roll 2 Hen. IV; Bosham Writ of the latter half of the sixteenth century; and the Charter of Bosham of 1607). I shall refer to these documents collectively as the old documents.

Mr. May has submitted that the word "men" used in these old documents must be interpreted as "inhabitants." He has referred me to the *Case of the Town of Leicester for Toll.*[1] In the course of that case Shute J. expressed the opinion that "an inhabitant within ancient demesne although he be not "tenant shall have the privileges."[2] For that proposition Shute J. relied on a statement in Fitzherbert's Natura Brevium (vol. 2, p. 228B). But there Fitzherbert is only pointing out that the writ of Quit of Toll can be sued by each one personally as opposed to the writ of Monstraverunt, which must be taken out by all the tenants collectively. On p. 228, however, are set out the forms of certain writs of Quit of Toll. In the first form it is stated: "We command you that you by no means distrain "the men of our manor of S. (if that manor be of the ancient "demesne of the Crown of England) to yield toll to you." In the second form the words are: "Whereas according to the custom "of our realm hitherto etc. obtained and approved, the men and "tenants of the ancient demesne of the Crown of England are "and ought to be quit of yielding toll throughout our whole realm; "nevertheless you grievously distrain the men and tenants of "the manor of S. which is of the ancient demesne of the Crown "of England." Mr. May has urged that Shute J.'s words show that at any rate in the reign of Queen Elizabeth I it was recognised that the men of Bosham included at least all the inhabitants of the manor, and that the defendant was at all material times within that category, even when he occupied the *Invader*, which was attached to the piles belonging to the lord of the manor. Mr. May also relied upon a history of the Manor of Bosham written by one John Smyth, the steward of the manor in 1637. Mr. Smyth says at p. 16: "Alsoe, the inhabitants within this "manor are free from payment of any manner of tolls, passages, "and carriages throughout England." It is clear, however, that he is relying upon the Close Roll of 11 Rich. II, to which I have already referred, and one must see what the expression "men "and tenants" meant in that document at that time.

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[1] (1585) 2 Leon. 190.

[2] Ibid. 191.

I reject the argument that the meaning in that document can be enlarged because later it was interpreted as covering a class who were not covered at the time the document came into existence although that class was in existence. The analogy used by Mr. May of the word "carriage" used in an old statute being enlarged to cover a motor-car is, in my judgment, a false analogy, since motor-cars were not in existence when the word "carriage" was used, and the question, therefore, there is whether the new type of vehicle is a carriage. The true analogy would be that at the time of the enactment "carriage" did not cover "cart." If that were so, "carriage" could never cover "cart."

I cannot give the word "men" the meaning contended for by Mr. May. One starts from the fact that the occupiers of land of a manor normally fell into two classes. The freemen of the manor held by free tenure; they were the "freeholders." The villeins held by unfree tenure. The villeins later became the copyholders. Coke on Littleton, 19th ed. (1832), vol. 1, chap. 9, p. 58a, says: "There is no tenant in the law that holdeth by copie "but only this kind of customary tenant"; and later he says: "Copyholders are but villeins who by long encroachment on "the lord have established a customary right to the estate." Both before and immediately after the Norman Conquest freemen and villeins both held by virtue of having to render services, but although the services required from the villein might in certain circumstances be of the same nature as the services required from the freeman, the villein's land still remained "parcel of the "manor." The legal conception of villeinage has its roots not in the connection of the villein with the soil but in his personal dependence on the lord (Vinogradoff, Villainage in England (1892), p. 44). The villein was subject to the law of the lord of the manor, his court being presided over by the lord or the lord's steward, who dispensed justice according to the custom of the manor, whereas the freemen had the right to have the King's law, that is, the common law, applied. As Professor Holdsworth says in his History of English Law, 5th ed. (1942), vol. 3, p. 30: "In "later law" (i.e., at about the end of the thirteenth century), "so soon as it was admitted that the services were villein services "the courts of common law would have enquired no further."

In the Year Book 20/21 Edw. I, p. 41, it is stated that a villein holding is land held at the will of the lord without any certainty as to title or term of enjoyment, as to kind or amount of services: see Vinogradoff, Villainage in England (1892), p. 77, footnote 2. And Professor Vinogradoff says at p. 47: There can be no question of his having any legal "ascription" to the soil (that is being irremovable by the lord).

All this leads one to the conclusion that the use of the word "tenant" in the Close Roll of 11 Rich. II covered only the freemen holding by free tenure. The use of the word "men" was necessary to cover some other class. To discover what that other class was it is necessary to consider the way in which a manor of ancient demesne differed from an ordinary manor.

In a manor of ancient demesne (and only in such a manor) there were not only two kinds of tenure. There was a third kind of tenure held by a class of persons known as villein socmen. Although villein socmen were villeins, they had many of the rights of a freeholder, including the right of appealing to the common law administered by the King's Court if the customary law as administered by the lord of the manor or his steward was thought to disregard their title or their rights or privileges.

Although this was so, yet in many ways they still remained villeins with only the villein's rights. The villein socmen are described by Bracton as being privileged villeins because their services were certain and they were protected not by the usual remedies at common law but by peculiar writs which enforced the custom of the manor. If a freeman was wrongly deprived of his holding, he had the Great Writ of Right Patent. The villein socman in such circumstances had the Little Writ of Right Close. Further, if there was any attempt to infringe the rights or increase the duties of the villein socmen of a manor of ancient demesne, they had the right (collectively in the first place) to a Writ of Monstraverunt, which was a complaint to the King that their rights had been infringed. Nevertheless, as Cozens-Hardy J. said in *Merttens* v. *Hill*[3]: "The copyholders in an ancient demesne "manor, like other copyholders, are merely to be considered as "occupying a part of the lord's demesne, and do not hold of the "manor."

In my judgment, it is this class, the villein socmen, who are covered by the word "men" in the phrase "men and tenants." In his book Villainage in England, p. 112, Professor Vinogradoff says: "Blackstone speaks of privileged copyhold as descended "from privileged villeinage; and as to the condition in the 13th "century of those 'men' or 'tenants in ancient demesne' of "whom we have been speaking, there can be no doubt." Vinogradoff also says at p. 112 that Bracton lays down that their tenure is villeinage, though privileged villeinage. The men of ancient demesne, says Bracton, are men of free blood holding in villeinage. Bracton's words are: "Liberi de condicione . . . "tenantes villenagium." In my judgment, men and tenants in the Close Roll of 11 Rich. II, as in the form of the writs set out in Fitzherbert's Natura Brevium, vol. 2, p. 228, meant villein socmen as well as freeholders. No doubt once the early Norman and Plantagenet times had passed the distinction between these two classes, and indeed the distinction between these two classes and the copyholders, largely disappeared, although the phrase "men and tenants" persisted. In my judgment, the phrase was then used to cover the tenants of the manor generally. I see no reason to suppose that the phrase achieved in the common law any wider meaning.

"The men of Bosham" is a phrase which has been handed down from generation to generation with some pride. I limit its common law meaning as including only those who hold land directly from the lord of the manor. It follows that, with regard to the period in respect of which money payments are sued for by the plaintiff, the defendant was not a "Man of Bosham." But as he is now a "Man of Bosham," and an injunction is sought against him, it is necessary to consider his rights now as a "Man of Bosham." Indeed, I have been expressly asked to do so by both parties.

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[3] [1901] 1 Ch. 842, 853; 17 T.L.R. 289.

One has, therefore, to consider what, if any, are the present-day rights of a "Man of Bosham." By the Charter of Bosham, 1607, it was declared: "To all and singular sheriffs, mayors, "bailiffs, constables, officers and all other faithful subjects, as "well within or without our liberties to whom these present "letters shall have come, greeting. Whereas according to the "custom of our realm of England hitherto held and approved men "and tenants of the ancient demesne of the Crown of England "are and ought to be free of toll, pannage, murage, carriage and "passage throughout our realm of England. . . . And because "the manor of Bosham with its appurtenances in the County of "Sussex, is of the ancient demesne of our Crown . . . 'we enjoin "'and command you one and all that you permit all and singular "'the men and tenants of the manor of Bosham aforesaid to be "'exempt from such toll, pannage, murage, carriage, passage of "'goods or his effects warranted throughout our whole realm "'aforesaid.'"

This charter is the last of the old documents. The earlier documents were worded very much the same, although the rights declared are not precisely the same rights as were declared in the charter: compare the wording of the first of them, the Close Roll of 11 Rich. II, which I have already read. Each of the old documents is declaratory of existing rights and, in so far as the charter purports to declare rights which are narrower than the rights declared in any earlier document, or narrower than rights which existed apart from the documents, it is clear that the charter does not put any limitation upon those wider rights: see *Crew* v. *Vernon*,[4] which decided among other matters that prescription was not determined by a new grant, but the new grant acts as a confirmation and so the right and title by prescription always remains; see also *Goodson* v. *Duffield*.[5] One has therefore to see what rights attached to the men and tenants of ancient demesne in the days even earlier than Richard II.

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[4] (1611) Moo.K.B. 818.

[5] (1612) Moo.K.B. 830.

It is interesting to see the way in which the ancient rights of a manor of ancient demesne are put by Coke in his Institutes. In Part II, vol. 2, p. 542, Coke says as follows: "It shall not "be impertinent nor unnecessary to learn from antiquity, how, and "in what sort the King's household was in those days provided "of victuals: certain it is, that as well before as after the Con- "quest, the King upon his ancient demesnes of the Crown of "England, had houses of husbandry, and stocks for the furnishing "of necessary provisions for his household; and the tenants of "those manors did by their tenures, manure, till, etc. and reap "the corn upon the King's demesnes, mowed his meadows etc., "repaired the fences, and performed all necessary things belong- "ing to husbandry upon the King's demesnes: in respect of which "services, and to the end they might apply the same the better" —I stress these words—"they had many liberties and privileges." Among the liberties and privileges stated by Coke are that they should not pay any toll, etc., and then Coke continues, "which "liberties and immunities constitute to this day albeit the original "cause thereof is ceased."

A great deal of discussion and argument took place before me with regard to the meaning of the word "toll." Mr. Megarry insisted that in early medieval times the word covered only the right to take money in respect of things bought and sold in markets and fairs. In the Termes de la Ley (1721), p. 561, toll is described as payment used in cities, towns, markets and fairs for goods and cattle brought thither to be bought and sold. Mr. May contended for a much wider meaning.

Clearly the men and tenants of Bosham were quit of many payments in addition to payments at markets and fairs. The word "passage" which occurs in the old documents means strictly passage over water, "way" being passage over land (see Tomlin's Law Dictionary, 3rd ed. (1835), vol. 2). Lords of manors had a prescriptive right to exact a toll in respect of goods which were brought over the water and landed on a quay which was repaired and kept by the lord of the manor. The headnote in *Prideaux* v. *Warne* [6] states: "Prescription to repair "a key (sic), and to have toll of all goods brought within the river, "naught, aliter of all goods landed within the manor." The claim in that case was that the plaintiff having from time out of mind had and repaired a quay within the manor on the river of Padstowe had the right to levy toll on all goods brought into the river. It was adjudged that he had the right of toll for all goods landed within the manor even though they were not landed at the wharf, but no right to levy toll unless the goods were so landed. In the course of his judgment Hale C.J. said[7]: "If "a man will prescribe for a toll upon the sea, he must allege "a good consideration." When one considers that the manor of Bosham was by the sea, and fish were no doubt part of the provisions the men and tenants were expected to provide when the manor was a royal manor, it is difficult to see why the words used in the old documents are not wide enough to cover freedom from toll when bringing boats alongside any quay and landing fish and goods, in so far at least as the goods might have helped, when the manor was a royal manor, to achieve the object set out by Coke. A number of authorities were quoted to me to show that the word "toll" was used in medieval times sometimes narrowly, sometimes widely. I can find nothing in them to suggest that the proper interpretation of "toll" in this particular case is narrower than that which I have indicated.

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[6] (1793) 2 Levinz 96; sub nom. *Warren* v. *Prideaux*, 1 Mod. 105.

I have not got to decide how far any right may extend today throughout the kingdom, although where any such right comes into conflict with the right to charge granted by an Act of Parliament the right given by the Act may well prevail over any ancient right not to pay dues; but there is, in my judgment, at common law, as evidenced by the old documents, some rights attached to the tenants of the manor of Bosham in connection with bringing boats into some harbours and landing on some quays without paying toll. Some of the witnesses called before me on behalf of the defendants claimed it was the right to land any goods in any dock or quay throughout the kingdom without charge. One of them stated that this right was recognised, for instance, at Littlehampton. Another of the witnesses went so far as to say that, even if he became very wealthy and bought a large yacht, or if he ran a large ship or ships as a business, he could still claim the right. The extent of the right is far less than the witnesses supposed.

In order to understand why this is so it is necessary to consider two matters. The first is that the whole conception of the right of freedom from toll is based on the provision of victuals for the King's household by individual men. In so far as fish was concerned, they would be expected to have and use some form of fishing boat. It seems to me that in the same way as the right to be free from market tolls seems to have arisen from the sale of produce for the purchase of manure or in some other way to enable the men of royal manors the better to cultivate the land which was used to grow victuals for the King's household, so would the right to bring their boats into quays and shores be connected with the need to catch and supply fish for the royal household.

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[7] 1 Mod. 105.

When in the Middle Ages commerce in the modern sense of the word started to be more common questions arose as to how far tenants of ancient demesne were quit of toll when they came into the market to buy and sell commercially, whether they were free for all goods bought and sold by way of merchandise or only for the buying and selling of such produce and things as concerned his land held in the manor. Fitzherbert took the view that the tenants were entitled to be quit of toll for all goods and chattels which they merchandised with others (see Fitz. Nat. Brev., vol. 2, 228A). Coke, on the other hand, says: "Tenants in ancient "demesne, for things coming of those lands shall pay no toll, "because at the beginning of their tenure they applied themselves "to the manurance and husbandry of the King's demesnes and "therefore for those lands so holden, and for all that came or "renewed thereupon, they had the privilege: but if such tenant "be a common merchant for buying and selling of wares or "merchandises, that rise not upon the manurance or husbandry "of those lands, he shall not have the privilege for them, because "they are out of the reason for the privilege of ancient demesne, "and the tenant in ancient demesne ought to be a husbandman "than a merchant by his tenure and so the books do be "intended"; and Coke then sets out an ancient record which he says supports his statement (see Coke's Institutes (1809 ed.), Part II, vol. 1, p. 221). *Ward* v. *Knight*[8] supports Coke. The head-note is: "A tenant in ancient demesne shall not be privileged "from paying toll where he trades as a common merchant." The court apparently in that case gave no public reason but privately agreed among themselves that that was the law. I follow Coke. One has, of course, to apply to this case an analogy from the position with regard to produce from land.

Applying that analogy, in my judgment, the common law limits any right of a tenant of the Manor of Bosham to be quit of passage and toll to the right in respect of a boat owned by himself and used primarily by him for the purpose of his fishing. This view seems to be borne out by the evidence before me. The oldest of the witnesses for the defendants, indeed, the only witness over 60 years of age called by the defendants, said that it was those who lived in Bosham and went fishing who tied up for nothing; and when that witness said: "We had free mooring down the "harbour and sometimes left the boat at the quay or the piles "for the night without paying," he was clearly referring to the boat which was owned by his grandfather when he, the witness, was young and which was used for fishing by his grandfather.

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[8] (1587) Cro.Eliz. 227.

Bosham Quay is no longer used commercially, but it was so used up to quite recent times. In 1851 the lord of the manor, Rear-Admiral Berkeley, leased the tolls and fees payable in respect of the quay to a Mr. Martin. There is a schedule to that lease setting out the quay regulations to be observed by all masters of vessels whatever trading (I stress the word "trading") to the Quay of Bosham. There is no exception in favour of any "Man "of Bosham," except that one of the items reads: "Manure "(except to the tenants of Maurice Frederick Fitzharding "Berkeley)." That exception may be based on an Act affecting tolls for manure, but it is interesting to notice that only manure for the tenants of the lord of the manor was excepted. There were apparently no tolls other than for trading. Mr. Megarry has drawn my attention to the fact that the regulations state: "Great damage having been done by light vessels lying alongside "the wharf, all vessels lying there light or coming alongside for "repair are to pay weekly one penny per ton." That, however, I think must be read subjectam materiam as being intended to refer to trading vessels.

I also have before me "A table of harbour dues payable to "the lord of the manor of Bosham on ships and vessels using "the quay mooring and foreshore and on all goods and merchan-"dise landed in or exported from the said manor." The date of that document is 1900. In that document, under "Tonnage "dues," all vessels except Bosham fishing craft using the quay to discharge cargo have to pay one penny per ton. All light vessels except Bosham fishing craft moored at the quay are to pay one penny per ton per week. There is a similar exception with regard to vessels using the foreshore for repairs. Bosham fishing craft using the foreshore are to pay one penny per year as an acknowledgment of the right of the Lord of the Manor of Bosham, and Bosham fishing craft using the quay are to pay one penny per ton per three weeks. From my point of view, I do not think this document helps very much. There is no definition of

"Bosham fishing craft." The defendant can use it as showing that there was at least an exception for Bosham fishing craft using the foreshore, while the plaintiff can use it by showing that there appears to be no special exemption for a "Man of Bosham" as opposed to fishing craft being used at Bosham.

There is, I think, no doubt but that in the course of centuries the whole question of the rights of a "Man of Bosham" has become confused, but, as I see it, that is no reason why a "Man "of Bosham" should not demand such rights as he has. In *Brimsgreen and Norton Manor*,[9] referred to in Coke's Institutes (1809 ed.), Part II, vol. 2, p. 654, toll had wrongfully been taken from the men of Brimsgreen and Norton "time out of mind," indeed, from before the Norman Conquest, but nevertheless the men of Brimsgreen and Norton succeeded in their action to resist the toll. As the sidenote says: "Note. A possession [of toll] "beyond time and memory shall not stand but give place to law."

Mr. Megarry then takes the point that, in any event, the rights declared in the old documents could not be rights against a man's own lord of the manor. He points out that the lord of the manor, as is shown by the Close Roll of 9 Ric. II, enjoyed the same liberties and quittances as his men and tenants with regard to toll. He argued that the writ of Quit of Toll would never lie against a man's own lord of the manor, and the writ of Monstraverunt was a writ only available if the lord exacted more services than he was entitled to exact. Mr. Megarry argued that this latter writ had nothing to do with whether or not the lord of the manor exacted tolls from his men and tenants. I do not think this argument can prevail.

It is quite true that the writ of Monstraverunt was a writ which was restricted in its use. It was restricted to the exaction of increased services and change of customs (see Vinogradoff, Villainage in England (1892) p. 101). Professor Vinogradoff quotes from the Stoneleigh Register, wherein it is written (I translate from the Latin): "If a lord exacts from his socmen "tenants other customs than were wont to be done when the "manor was in the hands of the ancestors of the King . . . the "tenants have the right to recover against the lord by a writ "of the King which is called Monstraverunt." I should have thought it was reasonably clear that when the manor of Bosham was a royal manor and the villein socmen were using their boats to provide the royal household with fish they would certainly not have toll taken of them for permanently keeping their fishing boats on the demesne, that is, on the foreshore of the manor, or for bringing their catch to the customary landing place, or loading their tackle from the landing place or leaving their boats for a short time at the landing place.

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[9] Coke's Institutes, vol. 2, pt. 2, 654.

There is no suggestion in any of the documents I have seen that the right to be quit of toll had an exception in favour of the lord of the manor, and I should have thought it clear that if a lord of the manor attempted to alter the custom of the manor by trying to make the men and tenants pay for landing at the landing place, even if he built a quay, or keeping their boats on the foreshore, it would be a clear case where the villein socmen would have the right to a writ of monstraverunt. Professor Vinogradoff, in discussing the position of the villein socmen, says (pp. 92, 93, and 94): "they are free of toll in all markets and "customhouses. . . . On the other hand, they are liable to be "tallaged by the King without consent of parliament, by virtue "of his private right as opposed to his political right." When ancient demesne land passed from the Crown to a subject "the "rule was, that the new lord could not tallage his tenants unless "in consequence of a royal writ. . . . This was an important "limitation of the lord's power, and a consequence of the wish to "guard against encroachments and arbitrary acts. . . . the "King does not want his land and his men to be subjected to "any vexatious burdens which would lessen their power of yielding income. . . ." It must always be remembered that the King might re-possess himself of a manor of ancient demesne and therefore took care to see that if he did so the estate would not be in any way diminished in value: see p. 107.

"Tallage" is defined in Coke's Institutes (1809 ed.), Part II, vol. 2, p. 532, as follows: "to share or cut out a part, and "metaphorically is taken when the King or any other have a "share or part of the value of a man's goods or chattels . . . or "puts any charge or burthen upon another." In Tomlin's Law Dictionary, 3rd ed. (1835), vol. 2, it is stated: "Tallage" is metaphorically used for a part or a "share of a man's substance, "carved out of the whole, paid by way of tribute toll or tax." I see no reason why it should not be applied to tolls generally, and if that be so, it would require a royal writ (of which there is no evidence) before toll could be exacted by the lord of the manor from his men and tenants.

Maitland in Pollock & Maitland's History of English Law, 2nd ed. (1898), vol. 1, p. 388, states: "The writ of Monstraverunt begins with the word 'Monstraverunt.' The King "addresses the lord:—A, B and C, men of your manor of X, which "is of ancient demesne of the Crown of England, have shown so "that you exact from them other customs and services than "those which they owe, and which their ancestors did in the "time when that manor was in the hands of our predecessors, "Kings of England." As Professor Maitland also says at p. 397: "the transfer of a lordship from one person to another "should not affect the position of the tenants. . . . as regards "them, their rights and duties, the manor is still conceived as "part of the royal demesne."

Mr. Megarry referred me to *Truro Corporation* v. *Reynalds*.[10] The material part of the headnote of that case reads as follows: "The corporation of Truro having proved a prescriptive right to "tolls, Held, that this exemption applied to the tolls of all other "places (except London), but not to the tolls of Truro." Truro was not a manor of ancient demesne. The inhabitants of the borough of Truro claimed exemption from tolls levied by the corporation of Truro under a charter of Queen Elizabeth I. That charter stated that the men of Truro had endeavoured to preserve the port of Falmouth and granted to the inhabitants to be incorporated by the name of the mayor and burgesses of the borough of Truro; it also stated that the burgesses and inhabitants of the borough and their survivors should be free of tollnet, passage, pontage, murage (and a number of other tolls) throughout the whole kingdom of England except the City of London. It was in those circumstances that the court held that the exemption from toll did not apply to tolls of the borough itself. It was pointed out by Tindal C.J.[11] that if that was the meaning of the charter, then who was to repair the bridges and the walls of the town? Tindal C.J. said [12]: "But upon looking at the words accurately, it "is plain they cannot relate to duties within the borough of Truro. "'Shall be free of tollnet, passage,'—that must mean passage "over the lands of others, for it is not probable that they should "have paid toll for passing over their own lands." Park J. said [13]: "I agree in the correctness of the construction put by "the Chief Justice on the general clause of exemption in the "charter. It would be absurd to suppose the inhabitants were "exempted from duties which must have been granted to the

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[10] (1832) 8 Bing. 275.

[11] Ibid.

[12] Ibid. 282.

[13] Ibid. 284.

"corporation to enable them to keep up the necessary repairs of "the town."

The case of a manor of ancient demesne is quite different. The lord of the manor in endeavouring to levy toll would be exacting something which he had no right to exact unless either the King had exacted it when it was a royal manor or he had a royal writ to warrant him doing so. Further, the exemption from toll came before the grant of the manor to the lord. I can find no satisfactory reason why an attempt to exact tolls should not have been restrained by a writ of monstraverunt, and that being so, I see no satisfactory reason for thinking that there was an exemption in favour of the lord of the manor with regard to the levying of tolls against the men and tenants of the manor.

To sum up this part of my judgment: doing the best I can to translate the rights of the common law "Man of Bosham," that is, the tenant of the lord of the manor of Bosham, into modern-day form, and bearing in mind not only the documents I have seen and the law of medieval times, but also the evidence I have heard as to what has been the practice heretofore, I hold that his rights, so far as the lord of the manor is concerned, are that he has the right permanently to moor a boat owned by himself and used primarily for the purpose of his fishing on the foreshore (or to have what I believe is called a mud berth) free of charge, and to use the quay without payment for the purpose, and only for the purpose, of embarking on to and disembarking from such boat or of unloading fish from such boat and of placing fishing tackle on board such boat. He further has the right to keep such boat moored to the quay for reasonably short periods, but not longer than a reasonable period between two consecutive tides if he decides to fish on each of such tides.

Mr. May endeavoured to widen the meaning of the phrase "Men of Bosham" by saying that there was, so to speak, a customary "Man of Bosham" in addition to a common law "Man of Bosham," and that the evidence which he has called showed that an inhabitant of Bosham who earns his livelihood in connection with boats afloat in Chichester harbour and whose father and paternal grandfather were also inhabitants of Bosham and earned their livelihood in the same manner had the rights which I have so far limited to the tenants of the manor. I think there is a very short answer to that contention. Even if his evidence prima facie shows such a custom going back for a considerable period in favour of some defined, wider class of person (and I do not think he has shown this), nevertheless it is necessary before custom is proved to assume a lost grant to that effect in existence in A.D. 1189. Here there can be no such assumption. We know from the old documents that any rights in 1189 were the rights of what I have termed the common law man of Bosham. I refuse to assume, with that knowledge, that there was a further grant giving to some other class of inhabitants these rights as well as to the men and tenants. I have already rejected the argument that the word "men" means inhabitants. I think that this mistaken interpretation of the word "men" has been the cause of much of the confusion which has arisen locally.

I now come to quite a different part of the case. Mr. May contends that, quite apart from any special rights, both the defendant and the company have the right as members of the public to use the quay and the piles on payment of a reasonable fee. Mr. May says that the quay is a quay built, and the piles are piles driven in, on the foreshore in the port of Chichester. That being so, says Mr. May, the public have the right to use the quay and the piles for all purposes incidental to navigation. That includes the right to tie up for the purpose of having repairs done and the right for any person to use the quay for the purpose of effecting repairs. The owners of the boats being repaired by the defendant, says Mr. May, tie up for repairs and the defendant uses the quay to enable him to effect those repairs. Quite apart from that, says Mr. May, if any person chooses to own a wharf in a port there is a right by the public reasonably to use that wharf on payment of a reasonable fee.

I start this part of the matter by considering the position without reference to the fact that Bosham is in the port of Chichester. There is a right to navigation over all tidal waters, even where at certain states of the tide the water may disappear from the particular place where the navigation is taking place. This right includes all rights necessary for the full enjoyment and exercise of the rights of convenient passage, including to anchor, to remain for a convenient time for the purpose of loading and unloading or completing repairs or of waiting until the wind and weather permits the ship to leave. Because of this right of navigation, no tolls may be taken by the owner of the bed of the sea or the foreshore for anchoring, save in a port or harbour (*Gann* v. *Free Fishers of Whitstable*).[14]

So far as these rights are concerned, it must always be remembered that they are rights attached to navigation and that the rights of navigation are analogous to the rights of the public on a highway on land; that is to say, the right of coming and going and doing these things incidental thereto. On a highway I may stand still for a reasonably short time, but I must not put my bed upon the highway and permanently occupy a portion of it. I may stoop to tie up my shoelace, but I may not occupy a pitch and invite people to come upon it and have their hair cut. I may let my van stand still long enough to deliver and load goods, but I must not turn my van into a permanent stall. In the same way, so far as navigation is concerned, I may have to wait for a favourable wind; I may have to load or discharge cargo, and I may have to do repairs necessary or desirable before again setting out to sea, but I may not permanently occupy a part of the water over a foreshore even if I am doing something which incidentally assists the navigation of others (*Denaby and Cadeby Main Collieries Ltd.* v. *Anson*,[15] where the claim was to moor a hulk in a public harbour for the supplying of coals to vessels). The right to have a permanent mooring is doubtful. Lord Esher M.R. and A. L. Smith L.J. in *Attorney-General* v. *Wright*[16] seem to say there is the right (although it may be that the judgments are based on a custom proved in the case), while Fletcher Moulton L.J. in the *Denaby* case[17] and Blackburn J. in *Marshall* v. *Ulleswater Steam Navigation Co.*[18] (to which I shall refer later) strongly indicate the contrary. I should have thought the latter is the right view. As was said many years ago: "A man may not use the highway to stable his horse."

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[14] (1864) 11 H.L.C. 192.

These being the rights of those who navigate vessels, one next has to consider the position if the owner of the foreshore erects on the foreshore, and therefore at a place where there would otherwise be navigable water at certain states of the tide, a permanent building such as a quay. It seems to me that the rights of navigation which the public possess result in their having two rights in relation to such a quay. In the first place, in a proper case they may have the right in an action properly constituted to obtain a mandatory injunction ordering the owner of the quay to remove the quay on the ground that it seriously interferes with their rights of navigation. I add that I can see no evidence to suggest that in this case such a cause of action exists. With regard to the second right, one has, I think, to consider the land which lies beyond the quay. A part of the

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[15] [1911] 1 K.B. 171, C.A.

[16] [1897] 2 Q.B. 318, 321, 323; 13 T.L.R. 480, C.A.

[17] [1911] 1 K.B. 171, 198.

[18] (1871) L.R. 7 Q.B. 166, 172.

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rights of navigation is, in my judgment, the right to land on or embark from any part of the land adjoining the foreshore, but only if there is the right to go upon that land. If the quay on the foreshore obstructs that being done, then there is the right to go upon the quay on payment of a reasonable toll in order to reach that land or reach the vessel.

Mr. May strongly relied upon *Marshall* v. *Ulleswater Steam Navigation Co.*[19] In that case the facts are lengthy, but it is important to understand them in order to understand the judgment. One A who owned land adjoining Ulleswater Lake entered into an agreement with the defendants granting them a right of way through one of his fields between a public road and pier which A built. Later A granted to the defendants a lease of the ground adjoining the latter. The pier was constructed by A and paid for by the defendants, but part of the pier was constructed on the bed of the lake and that bed was part of the freehold of the plaintiff. The plaintiff brought an action of trespass, alleging that the defendants caused persons to pass and re-pass over the pier and therefore trespassed upon the soil of the bed of the lake which was his property. The vessels in question also loaded and unloaded on water which was over the soil which belonged to the plaintiff. One of the facts found was that the waters of the lake were so shallow where they adjoined the land leased to the defendants that the defendants could not bring their steamboats near enough to embark or disembark their passengers directly upon their land. The action failed. Blackburn J. based his judgment upon the fact that the public had the right of highway over the lake and stated[20] that it was well established law that where there is a public highway the owners of land adjoining thereto have a right to go upon the highway from any spot on their own land. Consequently, said the judge, every person in the vicinity of Ulleswater whose land abuts on the edge of the lake has the right to come down to the brink of the water for the purpose of exercising the public right of navigation. If the water is too shallow to bring his vessel to the point where he can step upon it from the land, he has the right to pass over or through any part of the water which lies between his land and his vessel even if the ownership of the bed of the water is in another. The judge says[21]: "Therefore the rule of law is, that the owner of "the adjoining land, and those whom he permits to go thereon,

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[19] L.R. 7 Q.B. 166.

[20] Ibid. 172.

[21] Ibid.

"have the right to cross to and from their vessels by either "wading or walking over a plank, but that they have no right to "disturb the soil covered with water, as by permanently fixing "anchors." The judge then comes to the conclusion that the pier having been built by the defendants wrongfully on the plaintiff's soil the plaintiff might possibly have succeeded in having it removed, but that while it was there it was in effect the equivalent of a plank. The case certainly did not establish that anyone could use the pier for any purpose even if they had no right to go on the land adjoining the lake.

Eastern Counties Railway Co. v. *Dorling*,[22] referred to in *Marshall's* case[23] is, I think, of assistance. In that case the plaintiffs owned a pontoon which they attached to a wharf in such a position that those who desired to go upon the wharf had to pass over the pontoon. The defendant broke and entered upon this pontoon in order to get to the wharf and embarked and disembarked passengers across the pontoon from the wharf. The defendant pleaded that he had a right to embark and disembark on the wharf and that the pontoon was an obstruction to his right. Upon demurrer on that part of the case, Willes J. said[24]: "Upon "the demurrer we think judgment ought to be entered for the "defendant. The plea in effect states that the defendant has "the right to land at a quay upon the bank of a public navigable "river, and that the plaintiffs permanently moored their dummy "(that is, pontoon) so as to obstruct and prevent the defendant's "approach to the quay. . . . The plaintiffs, therefore, are "alleged by the plea to have prevented the defendant's approach "to his quay over the river, which was a public highway, by "substituting for the part of the river which the dummy occupied "the dummy itself, and making it, instead of the river, the "means and the only means of passing over that space. . . . "the defendant had a right to use the river as a highway until "he got near enough to the quay to exercise his right of landing "upon it. . . . The . . . dummy . . . interfered with the "right of the defendant to pass over the place as a way."

Still leaving out any effect there may be due to Bosham being in the port of Chichester, it seems to me that the question whether the defendants have the right to use the quay in this case must depend upon whether they use it as being the only reasonable way in which to get from a vessel which is in the course of being navigated to land upon which they are entitled to go or to get from that land on to the vessel. If that be so, then upon payment of a reasonable fee the defendants have the right to use the quay, in the course of and only in the course of embarking or disembarking or loading or unloading that vessel or indeed in the course of carrying out repairs to the vessel, provided the vessel has arrived in the ordinary course of navigation and that repairs are necessary or desirable before she can resume her voyage.

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[22] (1859) 5 C.B.N.S. 821.

[23] L.R. 7 Q.B. 166.

[24] 5 C.B.N.S. 821, 837.

What the defendants are endeavouring to do is something quite different from this. They are endeavouring to use the quay as a place of business. The boats that come to the quay to be repaired are not boats which have arrived in the ordinary course of navigation and require repairs before they can set off again. They are boats which arrive under a contract with, or at the express invitation of, the defendants for the purpose and only for the purpose of being repaired by the defendants in the course of their carrying on their business of repairing. I can find nothing in the authorities to suggest that such a course of business comes within the usual incidents of navigation and I see no right whatsoever to use the quay against the will of the plaintiff except for the limited purposes which I have indicated. I should add that there was no evidence that any lorry or car was being used for any of these limited purposes.

The rights of the defendants are not increased because Bosham Quay is within the confines of a port. The law has always recognised that the provision of a safe anchorage in a port or a harbour carries with it the right to exact a toll from those who use such anchorage; but even those who pay such toll have normally no rights beyond those of navigation. The provision of a wharf does not ipso facto give any right to use that wharf. If Mr. May's argument is right, strange consequences could follow. A wharf built for the purpose of landing oil could be cluttered up against the will of the proprietor with vessels discharging wheat or being repaired.

The true proposition of law is laid down by Lord Ellenborough C.J. in *Allnut* v. *Inglis*,[25] where he refers to a judgment of Hale C.J. He says[26]: "wherever the accident of time casts "upon a party the benefit of having a legal monopoly of landing "goods in a public port, as where he is the owner of the only "wharf authorised to receive goods which happens to be built

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[25] (1810) 12 East 527.

[26] Ibid. 538.

"in a port newly erected, he is confined to take reasonable compensation only for the use of the wharf . . . because there is "no other wharf in that port, as it may fall out: 'in that case, "'([Hale C.J.] says) there cannot be taken arbitrary and exces-"'sive duties for cranage, wharfage etc. . . . for now the wharf "'and crane and other conveniences are affected with a public "'interest, and they cease to be juris privati only'." This principle has later been applied in cases where, for instance, there is only one wharf certified for importers to lodge and secure wines without paying duties for them in the first instance.

Apart from this exception, the law is well laid down in Gunning, Law of Tolls (1833), p. 123: "As to the amount which "the owner of the wharf may demand as a remuneration for the "use of it, it is said that a man may for his own private advan-"tage in a port town set up a wharf or crane, and take whatever "rates he and his customers can agree for wharfage, cranage, "etc.; for he does no more than what it is lawful for every man "to do, viz., make the most of his own; and such are the coal, "wood and timber wharfs in the Port of London and some other "ports." Gunning goes on to point out that the duties payable may of course be fixed by prescription or by grant or by Act of Parliament. There is no question in this case of the quay of Bosham having any monopoly in the port of Chichester, and there is no suggestion, let alone evidence, that duties have been fixed by prescription, grant or Act of Parliament. The argument of Mr. May based on Bosham being in the port of Chichester fails.

The final point raised by Mr. May is on the length of the notice given by the plaintiff to terminate the use by the defendants of the quay for the purpose of their repairing business. Mr. May argues that if the notice be unreasonably short the fact that proceedings were not issued for a further two months cannot avail the plaintiff. He urges that *Minister of Health* v. *Bellotti*[27] can no longer stand in the light of the speeches of the majority of the Law Lords in *Winter Garden Theatre (London) Ltd.* v. *Millennium Productions Ltd.*[28] With regard to the length of the notice, Mr. May points out that the length was a week, whereas the notice contemplated in the proposed agreement for £100 p.a. was three months.

It is for the defendants to prove that the notice was unreasonably short. They have failed to do so. I have had no evidence

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[27] [1944] K.B. 298; 60 T.L.R. 228; [1944] 1 All E.R. 238, C.A.

[28] [1948] A.C. 173; 63 T.L.R. 529; [1947] 2 All E.R. 331, H.L.(E.).

1960

IVEAGH v. MARTIN.

Paull J.

to show that the defendants were put in any difficulty by the shortness of the notice, or that they were repairing any boats at the time, or were under any contract to repair any boats. Apart from such evidence, I hold that a week is ample notice.

It follows from my decisions that the plaintiff is entitled to judgment on the amount claimed. So far as the claim for an injunction is concerned, it clearly fails in the form claimed. I do not think in all the circumstances of the case that I should grant an injunction in any terms. I have deliberately laid down the parties' rights in some detail. This is probably sufficient; but if the plaintiff desires a declaration that the defendants have no rights save those I have laid down, I shall not enter formal judgment until the parties have had an opportunity of considering the form such a declaration should take and until the plaintiff has had an opportunity of making an application for leave to amend by adding a claim for a declaration.

[On May 30, his Lordship was informed that the plaintiff did not desire a declaration. His Lordship, accordingly, entered judgment for the plaintiff for the sum claimed.]

Judgment for the plaintiff against the defendant for £48 19s. and against the company for £4 19s. 6d. and an order for payment out of that sum paid into court by the company. Order for half the costs in favour of the plaintiff, against both the defendant and the company. Stay of execution as to costs for 21 days to be continued over the hearing if appeal lodged.

Solicitors: *Robins, Hay & Waters for Raper & Co., Chichester; Mackrell & Co.*

E. M. W.

1960
July 20, 21, 28.

Salmon J.

BUXTON AND OTHERS *v.* MINISTER OF HOUSING AND LOCAL GOVERNMENT.

Town and Country Planning — Development — Planning permission — Permission granted by Minister—Application by adjacent landowner to set aside decision of Minister—Whether "person "aggrieved"—Town and Country Planning Act, 1959 (7 *&* 8 *Eliz.* 2, *c.* 53), *s.* 31 (1).

An appeal by a company against the refusal of the local planning authority of permission to develop land owned by the company by digging chalk, was allowed by the Minister. Owners of adjacent property applied to the High Court under section 31 (1) of the Town and Country Planning Act, 1959,[1] to quash the decision of the Minister on the ground that the proposed operations by the company would injure their land, and that they were persons aggrieved by the action of the Minister:—

Held, that the expression "person aggrieved" in a statute meant a person who had suffered a legal grievance; that anyone given the right under section 37 of the Act of 1959 to have his representations considered by the Minister was a person aggrieved within section 31, if those rights were infringed; but the applicants had no rights under the statute, and no legal right had been infringed and therefore they were not entitled to challenge the Minister's decision.

Dictum of James L.J. in *In re Sidebotham* (1880) 14 Ch.D. 458, 465, C.A. applied.

Application under section 31 (1) of the Town and Country Planning Act, 1959.

The applicants, Aubrey Leland Oakes Buxton, and three other landowners applied to set aside a decision of the Minister under section 16 of the Town and Country Planning Act, 1947, allowing an appeal from the local planning authority refusing permission to D. Heath & Sons Ltd. to develop land owned by the company as a chalk pit.

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[1] Town and Country Planning Act, 1959, s. 31: "(1) If any person— . . . (*b*) is aggrieved by any action on the part of the Minister to which this section applies and desires to question the validity of that action, on the grounds that the action is not within the powers of the Act of 1947, of the Act of 1954, or of this Act, as the case may be, or that any of the relevant requirements have not been complied with in relation to that action, he may, . . . make an application to the High Court under this section. . . . (4) This section applies to action on the part of the Minister, taken after the commencement of this Act, of any of the following descriptions, that is to say— . . . (*b*) any decision of the Minister on an appeal under section 16 [of the Act of 1947] (which relates to appeals against planning decisions of local planning authorities) . . . (5) On any application under this section the High Court— . . . (*b*) if satisfied that the order or action in question is not within the powers of the Act of 1947, of the Act of 1954, or of this Act, as the case may be, or that the interests of the applicant have been substantially prejudiced by a failure to comply with any of the relevant requirements in relation thereto, may quash that order or action."

S. 37: ". . . (4) Where an application for planning permission is accompanied by such a certificate as is mentioned in paragraph (*b*), paragraph (*c*) or paragraph (*d*) of subsection (1) of this section, or by a certificate containing a statement in accordance with paragraph (*b*) of the last preceding subsection,— . . . (*b*) the local planning authority, in determining the application, shall take into account any representations relating thereto which are made to them, before the end of the period specified in the preceding paragraph, by any person who satisfies them that he is an owner of any of the land to which the application relates or that he is the tenant of an agricultural holding any part of which is comprised in that land. (5) The preceding provisions of this section shall apply, with the necessary modifications,— . . . (*b*) in relation to an appeal to the Minister under section sixteen of that Act from a decision of the local planning authority."

The following statement of the facts is taken from the judgment of Salmon J.: D. Heath & Sons Ltd. ("the operators") were the owners and occupiers of certain land in Cambridge Road, Stansted Mount Fitchet, in the County of Essex. On December 10, 1957, the operators applied under section 14 of the Town and Country Planning Act, 1947, to Saffron Walden Rural District Council for permission to develop their land by digging chalk. The rural district council were the local authority to whom the local planning authority had delegated its powers in accordance with Part III of the Act of 1947. On April 1, 1957, the local planning authority refused the application. Thereafter the operators appealed against this refusal to the Minister of Housing and Local Government pursuant to section 16 of the Act of 1947. The Minister caused a local inquiry to be held by an inspector appointed by him under sections 15 and 16 of the Act into the refusal of permission by the local planning authority. Amongst those who appeared at this inquiry, called evidence and were heard, were the operators, the local authority, and four substantial landowners, the present applicants, whose land was adjacent to that of the operators and was being used for agricultural and residential purposes.

The inquiry was held on November 13, 1958, and on December 1, 1958, the inspector presented a detailed report to the Minister in which he recommended that the operators' appeal should be dismissed. The inspector's recommendation was based principally on his findings that there was a serious danger of chalk dust being deposited on the land of the applicants in quantities which would be detrimental to the user of the land; and that there was no present shortage of chalk in the locality, although chalk produced from the operators' land could be sold profitably. The Minister rejected his inspector's report and allowed the appeal. In the reasons for this given in a letter of September 17, 1959, pursuant to section 12 of the Tribunals and Inquiries Act, 1958, it appeared that the Minister disagreed with the findings of his inspector.

On the application to the High Court, counsel for the Minister raised the preliminary point of law that the applicants were not " persons aggrieved " within the meaning of section 31 of the Town and Country Planning Act, 1959.

F. H. B. Layfield for the applicants. Two questions arise: (1) Has the Minister exceeded his powers under the Town and Country Planning Acts? or (2) have any statutory provisions not been complied with? The Minister was under a positive duty to hold an inquiry, and in this inquiry he occupied a quasi-judicial position.

J. R. Cumming-Bruce for the Minister. A preliminary point is raised whether the applicants are " persons aggrieved " within the meaning of section 31 (1) (*b*) of the Town and Country Planning Act, 1959? It is submitted that they are not, and that the application and any questions involved in it must fail, since they would have no title to proceed in the matter. Prima facie, they were persons aggrieved in the sense that they had a grievance, but in section 31 being " aggrieved " means having sustained some injury to some kind of legal right. But for the Act, the company could have developed their land as they pleased. The fact that the Minister has allowed the applicants to make representations at the inquiry confers no rights on them under the Act. In *In re Sidebotham*,[2] James L.J. said that " person " aggrieved " was a man who had suffered a legal grievance. Lord Goddard C.J. adopted that construction in *Rex* v. *London Quarter Sessions, Ex parte Westminster Corporation*.[3] [*Reg.* v. *Dorset Sessions Appeals Committee, Ex parte Weymouth Corporation*[4] and *Ealing Corporation* v. *Jones*[5] were also referred to.] The Minister owed no duty to the applicants, and the whole proceedings become otiose if the preliminary point is decided in favour of the Minister. Section 37 of the Act of 1959 is an example of legislation conferring a statutory right to appear at an inquiry on a specified class of persons, who are thus placed in a different position from individual members of the public at large.

Layfield in reply. " Person aggrieved " must be interpreted in the light of section 14 of the Town and Country Planning Act, 1947. Paragraph 3 of the Report of the Franks Committee said that any person whatsoever could approach the local planning authority. The Acts specifically conferred a right of appeal. The words of Lord Atkin in *Donoghue* v. *Stevenson*[6] regarding the duty owed to "my neighbour" are relevant. The Minister must have applied his mind to what persons were likely to be affected by his decision, and he had held that the appellants were amongst such persons. The words "any person aggrieved" are very wide. The same words can have different meanings in different statutes: see the judgment of Lord Hewart C.J. in *Sevenoaks Urban District Council* v. *Twynam*.[7]

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[2] (1880) 14 Ch.D. 458, 465.

[3] [1951] 2 K.B. 508; [1951] 1 T.L.R. 932; [1951] 1 All E.R. 1032, D.C.

[4] [1960] 3 W.L.R. 66; [1960] 2 All E.R. 410.

[5] [1959] 1 Q.B. 384; [1959] 2 W.L.R. 194; [1959] 1 All E.R. 286.

Cur. adv. vult.

July 28. SALMON J. read the following judgment, in which he stated the facts set out above and continued: The local authority, whose contentions at the inquiry were substantially the same as those of the applicants, do not challenge the Minister's decision. The applicants, however, seek to do so under section 31 of the Town and Country Planning Act, 1959. [His Lordship read section 31 (1) (4) and (5) and continued.] The principal points upon which the applicants rely are (1) that it appears from the Minister's letter of September 17, 1959, that in rejecting his inspector's findings of fact he relied on certain subsequent advice and information given to him by the Minister of Agriculture without affording the local authority or the applicants any opportunity of correcting or commenting upon this advice and information. (2) That the Minister's decision is inconsistent with another decision given by him in similar circumstances in relation to land situated close to the land in question. I express no opinion upon either of these points, which have not been fully argued, for Mr. Cumming-Bruce, on behalf of the Minister, has taken a preliminary objection which, in my view, must succeed. He argues that the applicants are not "persons aggrieved" within the meaning of section 31 of the Act of 1959.

This case raises, therefore, the perennial question as to what the legislature means when it uses the words "aggrieved person." This, however, is the first occasion upon which these words have had to be construed under the Town and Country Planning Act, 1959. I would respectfully repeat and adopt what was said by Lord Parker C.J. in *Ealing Corporation* v. *Jones*[1]: "I would like to "voice a protest that Parliament continues to allow this expres- "sion to come into Act after Act of Parliament. As long ago

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[6] [1932] A.C. 562; 48 T.L.R. 494, H.L.

[7] [1929] 2 K.B. 440; 45 T.L.R. 508.

[1] [1959] 1 Q.B. 384, 390; [1959] 2 W.L.R. 194; [1959] 1 All E.R. 286.

"as 1929, Lord Hewart C.J. in *Sevenoaks Urban District Council* "v. *Twynam*,[2] referred to the fact that these words were so often "used, and that if one looked at the cases, one would find some "cases going one way and some the other. Notwithstanding "that, the words continued to creep in after that date and "continue to do so today. This is another case where Parliament "has failed to make clear what was really intended by those "words."

Superficially, there is much to be said for the view that the applicants are aggrieved by the Minister's action. For example, Mr. Buxton, one of the applicants, as the inspector's report shows, has an estate of about 250 acres adjoining the operators' land. He is interested in landscape gardening and ornithology and has spent large sums of money for these purposes on his land. Moreover, he has a herd of pedigree pigs and some breeding mares very close indeed to the site from which the chalk is to be won. I can well understand his annoyance at the Minister's decision to reject recommendations which the Minister's inspector has made after a thorough inspection of the site and careful investigation of a considerable body of evidence. If I could approach this problem free from authority, without regard to the scheme of the Town and Country Planning legislation and its historical background, the arguments in favour of the applicants on the preliminary point would be most persuasive, if not compelling, for in the widest sense of the word the applicants are undoubtedly aggrieved. In my judgment, however, I am compelled to restrict the meaning of the words "person aggrieved" to a person with a legal grievance. Before the Town and Country Planning legislation any landowner was free to develop his land as he liked, provided he did not infringe the common law. No adjoining owner had any right which he could enforce in the courts in respect of such development unless he could show that it constituted a nuisance or trespass or the like. The scheme of the Town and Country Planning legislation, in my judgment, is to restrict development for the benefit of the public at large and not to confer new rights on any individual members of the public, whether they live close to or far from the proposed development.

The legislature made the local planning authority, under the general supervision of the Minister, custodians of the public's rights. It is plain from section 16 of the Act of 1947 that if the local planning authority grants permission for development, there can be no appeal to the Minister of any kind. It is only if the local planning authority refuses permission or grants it upon unacceptable terms that the applicant for planning permission may appeal to the Minister. The Act of 1959 has left this position unchanged. It would be strange indeed if the present applicants, who would have had no right to appeal to the Minister from the local authority's grant of planning permission, nevertheless have the right to apply to the courts from the Minister's grant of planning permission. I doubt whether the present applicants had any legal right to appear at the inquiry. Sections 15 and 16 of the Act of 1947 provide that the Minister shall afford the applicant for planning permission and the local authority an opportunity of appearing before and being heard by the inspector. The local authority is offered the opportunity, in my view, as custodians of the public right, and the applicant for obvious reasons, but the Act makes no provision for individual members of the public being heard. No doubt it was the practice of inspectors appointed under section 15 very sensibly to hear any member of the public who desired to be heard, even although he had no right to be heard.

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[2] [1929] 2 K.B. 440; 45 T.L.R. 508.

Under section 14 of the Act of 1947 anyone could apply for planning permission in respect of a piece of land notwithstanding that he had no interest in this land. It not infrequently occurred that someone intending to make an offer for land would apply for and obtain planning permission and then buy it without the owners having any idea that permission had been granted or even asked for. It was to meet this situation that the legislature enacted section 37 of the Town and Country Planning Act, 1959. This section makes provision that no application for planning permission by a non-owner shall be entertained unless the owner has been given notice of the application. The section also provides by subsection (4) as follows: "(4) Where an application "for planning permission is accompanied by such a certificate "as is mentioned in paragraph (*b*), paragraph (*c*) or paragraph "(*d*) of subsection (1) of this section, or by a certificate con"taining a statement in accordance with paragraph (*b*) of the "last preceding subsection,— . . . (*b*) the local planning authority, "in determining the application, shall take into account any "representations relating thereto which are made to them, before "the end of the period specified in the preceding paragraph, by "any person who satisfies them that he is an owner of any of the "land to which the application relates or that he is the tenant

" of an agricultural holding any part of which is comprised in " that land."

Then, by subsection (5): " The preceding provisions of this section shall apply, with the necessary modifications,— . . . (*b*) in " relation to an appeal to the Minister under section sixteen of " that Act from a decision of the local planning authority, as they " apply in relation to an application for planning permission which " falls to be determined by the local planning authority."

In my judgment, anyone given a statutory right to have his representations considered by the Minister impliedly has the right that the Minister, in considering those representations, shall act within the powers conferred upon him by the statute and shall comply with the relevant requirements of the statute. If these rights are infringed, then any such person is an aggrieved person within the meaning of section 31 of the Act. The applicants for planning permission, the local authority and any owner who has made a representation to the Minister under section 37, are persons to whom section 31 applies. Subsection (2) (*b*) of section 31 expressly confers power on the local planning authority. In my view this subsection was enacted in case it should be held that the local planning authority is excluded from the ambit of aggrieved persons by previous decisions under other Acts.

The Minister's action which these applicants seek to challenge infringed none of their common law rights. They have no rights as individuals under the statutes. Accordingly, in my judgment, none of their legal rights has been infringed, and in these circumstances it could not, in my view, have been the intention of the legislature to enable them to challenge the Minister's decision in the courts. Ever since the judgment of James L.J. in the well-known case of *In re Sidebotham*,[3] it has been generally accepted that the words " person aggrieved " in a statute connote the person with a legal grievance, that is to say, someone whose legal rights have been infringed. James L.J. said: " the words ' person aggrieved ' " do not really mean a man who is disappointed of a benefit which " he might have received if some other order had been made. " A ' person aggrieved ' must be a man who has suffered a legal " grievance, a man against whom a decision has been pronounced " which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title " to something."

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[3] (1880) 14 Ch.D. 458, 465.

On the other hand, there is a line of authority dealing with the prerogative writ of certiorari which suggests that in some cases the words "person aggrieved" may have a very wide connotation. See, for example, *Reg.* v. *Surrey Justices*[4] and *Rex* v. *Taunton St. Mary*.[5] This line of authority has not, however, been cited by counsel for the applicants and I have heard no argument in relation to it. It may be that the words "person "aggrieved" for the purposes of certiorari do not necessarily mean the same as "person aggrieved" within the meaning of section 31 of the Act of 1959.

Lord Hewart C.J. in *Sevenoaks Urban District Council* v. *Twynam*[6] stated: "as has been said again and again there is "often little utility in seeking to interpret particular expressions "in one statute by reference to decisions given upon similar "expressions in different statutes. . . . The problem with which "we are concerned is not, what is the meaning of the expression "'aggrieved' in any one of a dozen other statutes, but what is its "meaning in this part of this statute?"

As Lord Parker C.J. points out in the *Ealing Corporation* case,[7] one may look at the authorities only to see what the general principles are that can be extracted from them as a guide to the courts in approaching the question as to what the words "aggrieved person" mean in any particular statute.

I think that the guiding principle is that laid down by James L.J. in *In re Sidebotham*[8] to which I have already referred, and which, so far as I know, has never been challenged: the words "person aggrieved" in a statute connote some person with a legal grievance.

Apart from authority and the scheme of the Town and Country Planning legislation, there is, as I have already indicated, much to be said for the view that in ordinary parlance the applicants whose amenities may be spoilt and the value of whose land may be diminished by the proposed development are persons aggrieved by the Minister's decision. I must, however, apply the principle to which I have referred and I must have regard to the general scheme of the legislation. The relevant statutes, in my judgment, confer no right upon the applicants as individuals. None of their legal rights has been infringed and no legal obligation has been imposed upon them by the Minister's action.

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[4] (1870) L.R. 5 Q.B. 466.

[5] (1815) 3 M. & S. 465, 472.

[6] [1929] 2 K.B. 440, 443.

[7] [1959] 1 Q.B. 384, 390.

[8] 14 Ch.D. 458, 465.

I have, accordingly, come to the conclusion that the applicants have no legal grievance, and I must decide this preliminary point against them.

Applications dismissed with costs.

Solicitors: *Barlow, Lyde & Gilbert for H. Stanley Tee, Bishop's Stortford; Solicitor, Minister of Housing and Local Government.*

J. D. P.

PEARL AND ANOTHER *v.* LONDON COUNTY COUNCIL.

C. A.

1960
Oct. 6, 7,
10, 26.

Lord Evershed M.R., Harman and Donovan L.JJ.

Compulsory Purchase—Compensation—Business premises held under lease—Yearly tenancy—Six months' notice to deliver up possession—"Premises which shall be purchased"—Whether tenants "compelled to quit before expiration of" term—Metropolitan Paving Act, 1817 (57 *Geo.* 3, *c. xxix*), *s.* 90.

Landlord and Tenant—Business premises (security of tenure)—Acquisition under Metropolitan Paving Act, 1817—"*Expiration of term*"*—Landlord and Tenant Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *ss.* 24, 64.

The claimants were yearly tenants of a kiosk in Charing Cross station yard under a lease of 1946 granted by the Southern Railway Co. Ltd. Their tenancy could be determined by either party on six months' notice. On October 17, 1956, the London County Council, for the purpose of widening the Strand, purported to serve six months' notice to quit on the claimants under the Metropolitan Paving Act, 1817.[1] The acquiring authority having given to the claimants two extensions of time within which to leave, they gave up possession on July 3, 1958. The claimants claimed compensation under section 90 of the Act of 1817, on the ground that they had been compelled to quit "before the expiration of their term." The parties agreed that the Landlord and Tenant Act, 1954, applied to the claimants' tenancy and that, but for the acquiring authority's action, the claimants' possession would have continued indefinitely. They further agreed that the landlords could have determined the tenancy by December 25, 1957, if a case for doing so had existed under the Act of 1954. The acquiring authority had not purchased the freehold reversion of the landlords (the British Transport Commission) in the premises:—

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[1] Metropolitan Paving Act, 1817, s. 90: " . . . every tenant at will or "lessee for a year . . . in possession "of any such houses . . . which shall "be purchased by virtue and for the "purposes of this Act, and who shall "have no greater interest in the pre- "mises than as tenant at will or "lessee for a year, or from year to "year, shall deliver up the possession "of such premises . . . upon having six "calendar months' notice to quit such "possession . . . and in case any such "tenant should be compelled to quit "before the expiration of his or her "term in any such premises, then and "in such case the said commissioners "or trustees, or other persons as afore- "said, shall and they are hereby re- "quired to make satisfaction and "compensation for the loss or damage "which he or she shall or may sustain "thereby."

Held, (1) that in section 90 of the Metropolitan Paving Act, 1817, the phrase such premises "which shall be purchased by virtue "and for the purposes of this Act" was apt to describe purchases which would take place in the future, but which at the time when the powers under section 90 were exercised would be in existence either in the form of a completed conveyance or at least of a binding contract for sale. The result was that since the acquiring authority had not become the landlords, section 90 never validly operated, and the purported notice given by the acquiring authority was in truth a nullity, and the claimants had never been in a position to claim compensation under it (post, pp. 299, 300).

(2) That, assuming the notice was a valid notice, it was sufficient in order to avoid liability to pay compensation if the statutory notice did not require possession to be given at a date earlier than the date at which under the tenancy contract the landlords could have demanded possession, which in the present case, apart from the Landlord and Tenant Act, 1954, was six calendar months, and even allowing for section 64 of the Act of 1954, still, on the facts, the claimants were not required to give possession before the expiration of the tenancy extended by section 64. Accordingly, the acquiring authority's notice did not cause the claimants' tenancy to come to an end at an earlier date than that at which their landlords could have brought it to an end (post, p. 302).

Reg. v. *London and Southampton Railway Co.* (1839) 10 A. & E. 3 followed.

(3) That the compensation for which section 90 of the Act of 1817 made provision was the premature determination of an existing tenancy, and it did not extend to cover injury through the loss of a new tenancy or the opportunity of obtaining it and, if the notice of October 17, 1956, were a valid exercise of the power under section 90, the claimants would not have been entitled to compensation (post, p. 302).

APPEAL by case stated from the Lands Tribunal.

The appellants, John Edward Pearl and Alexander Pearl, appealed against the decision of the Lands Tribunal that they were not entitled as tenants to any compensation under section 90 of the Metropolitan Paving Act, 1817, by reason of the compulsory acquisition by the respondents, the London County Council (hereinafter called the acquiring authority) of West Lodge, Charing Cross Station, Strand.

The following is based on the agreed statement of facts: The claimants claimed as tenants of West Lodge, 16, Strand, in the forecourt of Charing Cross Railway Station, London. Their tenancy was created by an agreement dated November 21, 1946, between the Southern Railway Company and themselves.

At no time had any notice to determine the tenancy been given either by the Southern Railway or its successors and the landlords had no intention of taking any action to dispossess the claimants. No notice to determine the said tenancy had been given by the claimants. No other action had been taken by any of the above bodies to determine the agreement or tenancy. At all material times until June 30, 1958, Alexander Pearl carried on in the premises the trade of selling fancy goods.

On October 17, 1956, the acquiring authority served on the claimant, Alexander Pearl, a notice stating that the acquiring authority had determined to widen the Strand and that possession of the claimants' premises was necessary for this purpose and that the acquiring authority in exercise of the powers conferred by section 90 of the Metropolitan Paving Act, 1817, gave six months' notice to quit the premises. On November 15, 1956, a notice in the same terms was served by the acquiring authority on John Edward Pearl.

The claimants did not give up possession of the premises at the expiration of six calendar months from the date of service of those notices because the acquiring authority did not require them to do so. By letter dated July 5, 1957, from the acquiring authority the claimants were informed that the premises would not be required until December 25, 1957.

The acquiring authority did not subsequently require possession of the premises on December 25, 1957, and the claimants remained in possession until July 3, 1958. A few days before June 30, 1958, the acquiring authority informed the claimants that they then required the premises for the purposes of the scheme and required them to quit. Trading at the premises ceased on June 30, 1958.

At the time of the making of the request for possession and of the giving up of possession by the claimants both parties had agreed in writing that the Landlord and Tenant Act, 1954, applied to the claimants' tenancy and that, but for the acquiring authority's action under its statutory powers, the claimants' possession would have continued indefinitely unless their landlords for the time being could have satisfied the requirements of the Act of 1954. They were further under the impression and had agreed in writing that the landlords could have determined the tenancy (if a case for doing so existed under the Act) by December 25, 1957.

After setting out the agreed facts, the case stated continued: "Compensation, if any is due, arises under section 90 of the "Metropolitan Paving Act, 1817. In order to establish a claim "under that section, the claimants must at the expiry of six "months have an unexpired term. In the case of a tenant from "year to year, as this is, the question arises: had a landlord's "notice been given on the same date as the statutory notice, what "is the earliest date at which the notice could terminate the "tenancy?

"I turn now to the relevant facts. This tenancy is founded "on an agreement dated November 21, 1946. The agreement "was for three years which expired on December 25, 1949, "thereafter the agreement provided that it could be terminated "at six months' notice on either side. Taking these facts alone "it seems to me that the claimants have no unexpired term. "I have come to this conclusion because in my opinion the "notice of October 17, 1956, was the statutory notice and had "a landlord's notice been given on the same date any unexpired "term to which the tenants could have been entitled had been "exhausted long before July 3, 1958, the date upon which the "claimants gave up possession. But this does not end the "matter. I must now consider the effect of the Act upon which "Mr. Scholefield, for the claimants, mainly based his claim. "That Act is the Landlord and Tenant Act, 1954.

"It is admitted that this is a business tenancy and therefore "section 25 of that Act applies and this, argues Mr. Scholefield, "gives security of tenure to the tenant. Moreover, it is conceded by the acquiring authority that the landlord would not "have refused a renewal of the lease. Counsel stressed that this "renewal was not merely an expectancy, it was a definite right "under the Act, the claimants therefore have an unexpired term "for which they are entitled to be compensated.

"Now the only provision for compensation is section 90 of "the Metropolitan Paving Act, 1817, and if the claimants are "to succeed they must bring their claim within the ambit of that "section. . . .

"The claimants' rights in these premises are, of course, "derived from the agreement of 1946 and the term conferred by "that agreement after the expiry of the three years was a lease "from year to year terminable at six months' notice. The effect "of the Act of 1954 was not to cancel the agreement of 1946, "what it did was to restrict the rights of the landlord to "enforce his full pound of flesh, if I may so call it, under the "agreement. In certain circumstances he was compelled to "grant a new tenancy. The rights which the tenant got under "the Act were rights against the landlord. Here there has been "no attempt by the landlord to terminate this tenancy and there-"fore in my view no question of calling the Act of 1954 into "operation arises. Section 90 of the Act of 1817 gives an arbitrary "power to the authority, in this case the London County Council, "to command the delivering up of possession on six monthly "notice. Were it not for the Act of 1954 the landlord himself "could terminate the tenancy by due notice, he is only pre-"vented from doing so by virtue of the Act, but in my opinion "the Act of 1954 gives the sitting tenant no such protection "against an authority exercising powers under the Act of 1817. "Indeed it is obvious that it could not do so seeing that the "object of the notice was to enable the acquiring authority to "destroy the tenancy hereditament.

"The term of notice to which this tenant was entitled under "his agreement was six months. The acquiring authority gave "notice to the claimants in 1956 but did not take possession "until 1958 so that the tenants could not have any unexpired "portion.

"My conclusion is that the claimants here are not being "compelled to quit before the expiration of their term in this "tenancy, and my answer to the first question posed is that the "claimants have, in law, no right to claim compensation."

The claimants appealed against that decision as being erroneous in point of law on the following grounds:

"(a) That the expression the 'term' of a tenant in section 90 "of the Metropolitan Paving Act, 1817, means the limit of time "for which that tenant can withhold possession of the premises "from his landlord.

"(b) That had a landlord's notice instead of a statutory "notice been given on October 17, 1956, the tenants could not "have been forced to quit possession at any foreseeable future "time but would have been entitled to renewals of possession "indefinitely until the circumstances changed, of which there "was no sign.

"(c) That the President was accordingly wrong in holding "that, had a landlord's notice instead of a statutory notice been "given on October 17, 1956, any unexpired term to which the "tenants could have been entitled had been exhausted before "July 3, 1958.

"(d) That it is not questioned (i) that section 90 of the Act "of 1817 gives an arbitrary power to the London County Council "to command the delivering up of possession on six months' "notice, or (ii) that the Act of 1954 does not have the effect of "preventing the termination of his tenancy by such a notice, but "it is contended (i) that the object of section 90 is to give him compensation for the difference between his position as it is, and by "which his tenancy is arbitrarily broken by a statutory authority, "and what it would have been if there had been no intervention and he had continued with his landlord, and consequently, "for the loss or damage which he sustains by being compelled to "quit before what would normally have been the expiration of the "term for which he could have continued to hold, and (ii) that the "Act of 1954 would have preserved his term against anything "other than such an arbitrary statutory notice."

At the hearing before the Court of Appeal, the court was informed that the acquiring authority had not in fact purchased the reversion in the premises of the landlords, the British Transport Commission. The commission had given to the acquiring authority permission to demolish the kiosk.

Charles Scholefield Q.C. and *Douglas Frank* for the claimants, the appellants. The claimants are entitled to compensation under section 90 of the Metropolitan Paving Act, 1817. In that section the phrase "in case any such tenant should be compelled to quit before the expiration of his or her term in such "premises" means, in the case of business premises, the term for which a tenant could lawfully retain possession as against his landlord. Compensation is payable under section 90 to a tenant who is compelled to give up possession before he would otherwise have to do so. What matters is the possibility of the continuance of the term. "Term" means the length of time for which a tenant could remain in possession. [Reference was made to sections 24, 25 (1), 29, 30 (1) (*f*) and 64 of the Landlord and Tenant Act, 1954.] None of the provisions in the paragraphs of section 30 would have applied to prevent the claimants obtaining a new tenancy. Paragraph (*f*) of section 30 (1), which gives to a landlord a right to oppose the grant of a new tenancy where he proposes to demolish the premises, would not have applied. The paragraph is limited to a true landlord, which the acquiring authority was not: *per* Lord Selborne L.C. and Lord Watson in *Fleming* v. *Newport Rly. Co.*[2]

It appears from the judgment of Page-Wood V.-C. in *Penny* v. *Penny*[3] that, in a case such as this, in estimating the compensation it is necessary to look at two things: (1) the time when the property is taken; (2) the exact interest the claimant had at that time, assuming the property had not been taken. It is then possible to arrive at the value of the claimant's interest. [Reference was made to section 121 of the Lands Clauses Consolidation Act, 1845, and to *Bogg* v. *Midland Rly. Co.*[4]]

The claimants' right to apply for a new tenancy under the Act of 1954 was taken from them by the acquiring authority. The effect of the Act of 1954 was to continue the claimants' term indefinitely. *Wednesbury Overseers* v. *South Staffordshire Waterworks Co.*[5] shows what a tenancy from year to year is. Such a tenancy of business premises goes on until it is determined effectively by a notice under the Act of 1954. That Act has given a wider meaning to " term " in section 90 of the Act of 1817 than it originally had.

When the acquiring authority decided to widen the Strand, they could have done one of three things: (1) expropriated the landlords and then served a notice on the claimants to quit under the Act of 1954; (2) expropriated the landlords and then they could, as a local authority landlord, have applied the provisions of section 57 of the Act of 1954; (3) they could have served a statutory notice under section 90 of the Act of 1817. If the acquiring authority had adopted course (1) or (2) the claimants could have argued with the acquiring authority, but by following course (3) the claimants could not dispute the authority's right to take the property, they can merely claim compensation. [Reference was made to *Holloway* v. *Dover Corporation*[6].] The loss which the claimants have suffered and for which they are entitled to compensation is the prospect of extending the period of their lease and retaining possession against their landlord. The Act of 1954 was passed for the protection of business tenants and the claimants should have the benefit of it.

Lynch v. *Glasgow City*[7] shows the position before the Act of 1954 was passed. That Act continued the legal interest of the tenants, so that they have not a mere hope of the continuance of their tenancy but an expectation that it will be continued. In *Bogg* v. *Midland Rly. Co.*[8] it was held that an option to take a further lease must be taken into account in assessing compensation although the option might not have been exercised.

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[2] (1883) 8 App.Cas. 265, 271, 272, 281, H.L.

[3] (1867) L.R. 5 Eq. 227, 235.

[4] (1867) L.R. 4 Eq. 310.

[5] (1885) 16 Q.B.D. 359.

[6] [1960] 1 W.L.R. 604; [1960] 2 All E.R. 193, C.A.

[7] (1903) 5 F. 1174.

In any event, the claimants are entitled to compensation for disturbance under the Acquisition of Land (Assessment of Compensation) Act, 1919, s. 2 (2).

K. F. Goodfellow for the London County Council, the acquiring authority, the respondents. It is not a condition of the exercise of the powers conferred by section 90 that the reversion of the lease should have been vested in the acquiring authority. The acquiring authority had power to acquire the interests of all persons in the premises. By arrangement with the landlords, the British Transport Commission, the acquiring authority was let into possession. No payment was made to the commission. At no time was the freehold vested in the acquiring authority. Nevertheless, the acquiring authority could exercise the powers conferred by section 90. In that section "shall be purchased" does not mean "shall have been purchased." It is sufficient if there is an intention to acquire the reversion. The material date for measuring the extent of this interest being acquired is the date when the notice to quit is given. Section 90 is loosely worded. It was properly invoked here. It does not matter that at the date of the notice all other interests in the premises had not been acquired.

The grammatical idiom of the Act of 1817 differs from that of modern statutes. Throughout the present tense "shall" is used only in the sense "and is hereby required to be done." The authority has only to show that there has been an adjudication under section 80, so that the authority has authority to acquire premises and compel conveyances. It is conceded that when the notice is given, the acquiring authority must show a bona fide intention to carry out improvements. If section 90 required the authority to purchase the reversion before it could serve a valid notice, the section would be otiose so far as anything less than a quarterly tenancy was concerned, because the acquiring authority, qua landlord, could get a tenant out much quicker. The statutory power to evict after six months would be ludicrously unnecessary for a tenant at will, for a tenancy at will is determinable by notice at any time, or even by the landlord assigning the reversion with notice to the tenant. For the purpose of assessing compensation, the relevant factor is the tenant's right to stay on, not the prospect of doing so. A tenant can dispute the validity of an adjudication but the validity would not depend at all on whether the reversion was vested in the authority at the time. The landlord had not given any notice in *Reg.* v. *London and Southampton Rly. Co.*[9] So long as the tenant is not compelled to quit before the date when a landlord's notice, if given at the same time as the statutory notice, would have expired, the tenant has not been compelled to quit before the expiry of his term. In *Reg.* v. *London and Southampton Rly. Co.*[9] the acquiring authority had contracted to purchase, but the legal interest did not vest until after the material time and they could not serve an effective notice to quit until then: see also *Thompson* v. *McCullough.*[10] A contract to purchase the reversion does not affect the tenant, because it might be rescinded by the landlord. A valid notice to quit must "bite" when it is given. *Syers* v. *Metropolitan Board of Works*[11] concerned the comparable section 121 of the Lands Clauses Consolidation Act, 1845.

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[8] L.R. 4 Eq. 310.

In *Watson* v. *Secretary of State for Air*[12] the court proceeded on the footing of the earliest date on which the tenant could be compelled to get out. If the London County Council had become landlords, they could, apart from the statutory power, have given a landlord's notice to quit and resisted an application for a new tenancy on the ground that the premises would be demolished. The tenant would only have been entitled to the rateable value of the premises under the Act of 1954, but, because the reversion was not vested in the acquiring authority, the tenant is submitting that he should be compensated as if his tenancy could have gone on for ever.

The authority cannot begin to demolish until the payment has been tendered, but that does not affect the question of whether the owner of a minor interest has to give up possession. The acquiring authority is in the dilemma that until the tenant gives up possession one cannot know how much of his term is unexpired and he cannot be tendered the correct amount of the compensation. "Shall be purchased" is equivalent to "is to be "purchased."

The context of section 93 shows clearly that the virtually identical language ("as shall be purchased") in that section

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[9] (1839) 10 A. & E. 3.

[10] [1947] K.B. 447; 63 T.L.R. 95; [1947] 1 All E.R. 265, C.A.

[11] (1877) 36 L.T. 277, C.A.

[12] [1954] 1 W.L.R. 1477; [1954] 3 All E.R. 582, C.A.

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cannot mean "as shall have been purchased." There is no grammatical reason why the similar phrase should have a different tense in section 90.

Charles Scholefield Q.C. in reply. The terms of the bargain between the British Transport Commission and the London County Council may have been that the landlords were to demand no purchase money but were to continue to have the rent until the London County Council actually required the premises. The tenant would not have been put on inquiry and would be entitled to assume that the acquiring authority had had the power to serve a valid notice under section 90. It ought not to be assumed that a party had quitted voluntarily when they had been served with a notice, which was bad for a reason which was not apparent, since they had no direct knowledge of the terms.

Cur. adv. vult.

October 26. Lord Evershed M.R. read the judgment of the court.

This is an appeal by way of case stated from a decision of the Lands Tribunal upon a preliminary point of law arising out of a claim made by the appellants for compensation under section 90 of the Metropolitan Paving Act, 1817.

The facts are set out in the tribunal's decision and may be summarised as follows: On October 17, 1956, the London County Council (hereinafter called "the acquiring authority") in contemplation of the widening of the Strand, served a notice upon the appellants in purported exercise of the powers granted by section 90 of the Act of 1817. Other powers under the Act include the right to adjudge that an existing building will obstruct the proposed street widening and to serve a notice upon the owner to treat for its compulsory purchase, so that the acquiring authority can remove the obstruction. (See section 80 of the Act.)

Section 90 then enacts, inter alia, that every tenant at will or lessee for a year or from year to year of such premises "which shall "be purchased by virtue and for the purposes of this Act" shall deliver up possession of the premises to the acquiring authority after having six months' notice to quit. The same section proceeds to enact that "in case any such tenant should be compelled "to quit before the expiration of his or her term in any such "premises" then the acquiring authority shall "make satisfac-"tion and compensation for the loss or damage which he or she "shall or may sustain thereby. . . ." The notice which the respondents served upon the appellants under this section required them to quit premises, being a kiosk in the foreground of Charing Cross Station, where the appellants had for a number of years carried on a retail trade of selling fancy goods.

The premises were held by the appellants under an agreement with the Southern Railway Co. Ltd. dated November 21, 1946. The railway's interest as landlord later became vested in the British Transport Commission. In consideration of a rent of £500 per annum payable quarterly, the Southern Railway Company let the premises (known as West Lodge, Charing Cross Station, Strand) to the appellants for three years from December 25, 1946, subject to a right in the railway company, in certain circumstances, to determine the tenancy by six months' notice during the three years, and with a right in the company and in the appellants to determine the tenancy after the expiration of the three years by giving six months' notice to expire at any time of the year. The result was that after December 25, 1949, the appellants became tenants from year to year of the premises but were liable to have this tenancy determined by such a six months' notice expiring at any time.

After serving upon the appellants on October 17, 1956, the notice to quit purporting to be under section 90 of the Act of 1817, the acquiring authority gave the appellants two extensions of time within which to leave, and, as a result, the appellants did not in fact give up possession of the premises until July 3, 1958. Thereafter they preferred their claim for compensation under section 90, contending that, within the meaning of that section, they had been compelled to quit "before the expiration of their "term." The claim being resisted by the acquiring authority, the matter was referred to the Lands Tribunal.

Before that tribunal the appellants proved or it was conceded, inter alia, (a) that at no time had any notice to determine the tenancy created by the said agreement been given thereunder either by the Southern Rly. Co. Ltd. or its successors and that such landlords had no intention of taking any action to dispossess the appellants. No notice to determine the said tenancy had been given by the appellants. No other action had been taken by any of the above bodies to determine the agreement or tenancy. (b) That at the time of the making of the request for possession and of the giving up of possession by the appellants both parties had agreed in writing that the Landlord and Tenant Act, 1954, applied to the appellants' tenancy and that, but for the acquiring authority's action under its statutory powers, the appellants' possession would have continued indefinitely, unless their landlords for the time being could have satisfied the requirements of the Act of 1954. They were further under the impression and had agreed in writing that the landlords could have determined the tenancy (if a case for doing so existed under the Act) by December 25, 1957.

Two preliminary questions of law were put to the Lands Tribunal. They were these: (1) whether upon the agreed facts the appellants had any right to claim compensation; (2) if the answer were in the affirmative, whether the claim was limited to compensation for loss suffered by insecurity of tenure after the expiry of the six months' notice given as aforesaid by the acquiring authority. This second question does not really arise and no more need be said about it. The tribunal answered the first question in the negative, taking the view that the appellants had not been compelled to quit before the expiration of their term in the tenancy.

Mr. Scholefield argued before us that this decision is wrong; and the basis of his argument was this. The appellants' tenancy was admittedly a tenancy of business premises to which the Landlord and Tenant Act, 1954 (hereinafter called the Act of 1954), applies: and the effect of the Act of 1954 was to extend the " term " of the tenancy until such time as the appellants' position under that Act vis-à-vis the landlord should be determined, e.g., by a new tenancy being granted or refused. In other words, if the question had been asked, before the acquiring authority served their notice under section 90, " When does the " appellants' term in these premises expire?" the answer would have been: " When, following a valid notice to quit given by the " landlords and a claim for a new tenancy or for compensation " being made by the appellants under the Act of 1954, the issues " arising under that Act are settled." In this connection reference was made to sections 23, 24, 25, 57 and 64 of the Act of 1954.

Mr. Goodfellow for the acquiring authority, on the other hand, answered the same question by saying that the appellants' term expired on the earliest date that the landlords could have determined it by notice under the tenancy agreement at the time when the acquiring authority had served their notice under section 90: and this would admittedly have been before the appellants actually quit the premises on July 3, 1958. So, he argued, they were not obliged to quit before their term had expired and are, therefore, entitled to no compensation.

Returning to section 90 it will be observed that it relates and relates only to tenants at will and tenants for a year or from year to year " of such premises which shall be purchased by virtue and " for the purposes of this Act." It emerged during the hearing of the case that these particular premises have so far not been purchased. Indeed the building itself, being a kiosk, no longer exists, having been demolished by the acquiring authority in order to widen the Strand. Counsel for the appellants informed the court that his clients had paid their rent to the British Transport Commission right up to the time they left the premises: and counsel for the acquiring authority said his clients had not so far purchased the premises or otherwise acquired the interest of the British Transport Commission therein. What is the precise situation at the present time is not clear, but it seems that the acquiring authority was at any rate given tacit permission by the British Transport Commission to demolish the kiosk. Mr. Goodfellow sought to avoid the obvious difficulty that these facts created by contending that the words " shall be purchased " could properly be taken to refer to a purchase which the acquiring authority intended to make at the time they served their notice under section 90. In our view this is not the true construction. The Act of 1817 was contemplating purchases which at the time it was passed were certainly in futuro: but in the idiom of the day the expression " which shall be purchased," etc., was apt to describe purchases which should take place in the future but which, at the time when the powers under section 90 came to be exercised, would be in existence either in the form of a completed conveyance or at least a binding contract for sale. It is to be noted that in the London and Southampton Railway Act (4 & 5 Will. 4, c. lxxxviii, s. 47) Parliament when dealing with lands which an acquiring authority—there the railway company—merely intended to purchase, used the expression " lands which " shall be intended to be taken or used for the purposes of this " Act." The words in section 90 of the Act of 1817 are quite different.

Furthermore, if section 90 is construed as giving enabling powers to an authority who has become the landlord of the premises, difficulties which might otherwise arise in the construction of the language disappear. The new landlord could get rid of minor subsisting tenancies by six months' notice. If this means, for example, that a tenant for a year or from year to

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year has to quit before the expiry of his term, he is compensated. A tenant at will would, no doubt, be generously treated, if he also were given the same notice, but although the reason for the mention of tenants at will in the section is not at this distance of time altogether clear, this circumstance raises no inference sufficiently strong to justify some construction of the section which its words would not otherwise bear.

The result, therefore, is that in our view section 90 was never validly operated in this case and the purported notice under it given by the acquiring authority was in truth a nullity. It follows that the appellants have never been in a position to claim compensation under the section.

But since the parties have hitherto proceeded upon the view that the notice was a valid notice, and the case was fully argued before us whether, on that footing, compensation would be payable, we think it right to express an opinion on the point. It is also adverse to the appellants' contention. For if, contrary to the view we have formed, the words "shall be purchased" ought to be expanded so as to include "shall be intended to be purchased" or so as otherwise to comprehend premises in respect of which the acquiring authority has adjudged that the buildings must make way for contemplated street works, still we think that the appellants' claim must fail. For if the words be so construed, then the language of section 90 of the Act of 1817 becomes strictly analogous to that of the Southampton Railway Act above mentioned, and if that hypothesis be accepted, the case of *Reg.* v. *London and Southampton Ry. Co.*[1] is authority for the view that the later language in the section "expiration of his term" must be construed as referring to the earliest point of time at which the landlord could validly, according to the terms of the contract of tenancy, have terminated the tenancy from year to year. In that case the tenants were at the relevant dates tenants from year to year of the premises in suit. They had, in fact, been in possession of the premises as such tenants for a long period of years; and they proved (like the appellants in the present case) that in the natural course of events their landlord would not have been in the least likely to give notice terminating the tenancy in the immediately foreseeable future. The railway company, having determined to acquire the tenants' premises for the purposes of their railway, served a six months' notice to quit on the tenants in the month of January, 1837. This notice they later extended so as to expire at Michaelmas, being under the impression that the tenants' yearly tenancy ran from Michaelmas to Michaelmas. At the time of the service of the notice and of its extension the railway company had not acquired the reversion of the property. It appears, however, from the judgment in the case, that the railway company did acquire the reversion before the month of July when, having discovered that the tenancy ran in fact from Christmas to Christmas, they notified the tenants that they would not be required to deliver possession until Christmas; the railway company did not, however, serve any fresh notice after they had acquired the reversion. The tenants quitted the premises at or shortly after Christmas, 1837.

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[1] (1839) 10 A. & E. 3.

In this state of facts the Court of Queen's Bench rejected the tenants' claim to be paid any compensation under section 48 of the Act on the ground that they had been required to deliver up possession "before the expiration of their term or interest," including compensation based on the suggestion that their occupation had been uncertain or hazardous from the date of the service of the notice. The judgment of the court, delivered by Lord Denman C.J., contains the following sentences[2]: "We cannot "think that the Act of Parliament requires two notices in the "case of a tenancy from year to year; but the true construction "is, that the company might either give the ordinary landlord's "notice ending with the current year of the tenancy, in which "case no compensation would be due, or six months' notice under "the Act, to be given at any time, in which case the tenant "would be entitled to compensation for the value of the term "between the expiration of the six months' notice and the time "when a regular landlord's notice would have expired. But in "order to entitle the tenant to such compensation, the premises "must be given up. If, as in this case, the company inform "the tenant that he may hold them till the end of the current "year, and he chooses so to do, the situation of the parties is the "same as if a regular landlord's notice had been originally given, "and the tenant is entitled to no compensation, because he has "voluntarily retained the possession. It makes no difference "that the company were not landlords when they gave the notice "in January; that notice was undoubtedly meant to operate "under the Act, and would have done so but for the subsequent

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[2] 10 A. & E. 3, 10.

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"conduct of the parties. Under these circumstances, we are of "opinion that this rule must be discharged."

It is in our judgment clear that the reasoning of the Court of Queen's Bench in the case cited proceeded on the basis that where the statutory power extended to the giving of a notice to quit to tenants of premises "which shall be intended to be taken "or used for purposes of the Act," then it was not necessary for the acquiring authority to show that a valid notice to quit by the landlord had in fact been given. It sufficed, in order to avoid liability to pay compensation, if the statutory notice did not require possession to be given at a date earlier than the date at which, under the tenancy contract, the landlord could have demanded possession at the date of the statutory notice. In the present case, apart from the Landlord and Tenant Act, 1954, the British Transport Commission could have terminated the appellants' tenancy at any time by six calendar months' notice. It follows, therefore, according to the case we have cited, that the notice of October 17, 1956, did not cause, or would not have caused, the appellants' tenancy to have come to an end at a date earlier than that at which the British Transport Commission could then have brought it to an end.

But Mr. Scholefield invoked the Landlord and Tenant Act, 1954. The effect of the relevant provisions of this Act is to give to a business tenant (such as are the appellants) the right, or at least the opportunity, if his existing tenancy were determined, to obtain by order of the court a new tenancy. But in our view the compensation for which section 90 of the Act of 1817 made provision is for the premature determination of an existing tenancy, and cannot extend fairly to cover injury suffered through the loss of a new tenancy or the opportunity of obtaining it. It is true that, by virtue particularly of section 64 of the Act of 1954, where a landlord gives notice to determine an existing tenancy, the term of that tenancy is extended for an indefinite period sufficient to cover the determination of any proceedings which may be instituted under the Act and three months thereafter. In the present case, however, as earlier stated, the appellants were not in fact required to go out of possession until July 3, 1958, a period not far short of two years after service of the notice by the London County Council. Mr. Scholefield has not pressed any argument before us that this period of nearly two years was less than the period for which, by virtue of section 64 of the Act of 1954, the appellants' tenancy would sensibly have been extended had the Act of 1954 operated in regard to it. It follows, therefore, in our view, that upon the footing that the London County Council's notice of October 17, 1956, was a valid exercise of the power under section 90 of the Act of 1817, still the appellants would not have been entitled to compensation.

In the result the appeal fails and must be dismissed.

Appeal dismissed with costs.

Solicitors: *Sidney Pearlman; J. G. Barr, the Solicitor, London County Council.*

B. A. B.

BROWN *v.* NATIONAL COAL BOARD.

C. A.

1960
Oct. 10, 11, 12, 13, 14.

Lord Morris of Borth-y-Gest, Holroyd Pearce L.J. and Pilcher J.

Mines—Act of 1954—*Breach of statutory duty—Roof and sides—Fall of stone from roof following fall of girder—Duty to keep road and working place secure—Necessary steps—Whether impracticable to avoid or prevent contravention—Mines and Quarries Act,* 1954 (2 & 3 *Eliz.* 2, *c.* 70), *ss.* 48 (1), 157.

The plaintiff was employed by the defendants as an electrician in one of their coal mines. A damaged tub was sent along a road in the mine on an endless haulage when it came off the rails, knocked down a prop supporting a roof girder which, as a result, came down at one end; at the same time a piece of stone fell from the roof. The overman sent for the plaintiff to remove an electric light fitting from the girder before temporary supports were erected. The plaintiff returned, unknown to the overman, saw the girder down and, realising what was wanted, started work on the light fitting when another stone fell from the same part of the roof and injured him. The plaintiff brought an action against his employers alleging negligence and breach of statutory duty including, inter alia, a breach of section 48 of the Mines and Quarries Act, 1954.[1] Thesiger J. gave judgment for the defendants. The plaintiff appealed on the judge's findings relating to section 48:—

Held, that on its true construction, section 48 did not impose an absolute duty on the manager "to ensure" that the road or working place should be kept secure; that, on the facts, the manager had taken all the necessary steps to keep the road secure; it was secure until the tub knocked away the prop supporting the girder, and when a state of insecurity resulted, immediate steps were taken to remedy the situation, before the manager could have known about it; and, accordingly, that the manager had complied with the duty imposed by section 48.

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[1] Mines and Quarries Act, 1954, s. 48 (1): "It shall be the duty of "the manager of every mine to take, "with respect to every road and "working place in the mine, such "steps by way of controlling move-"ment of the strata in the mine and "supporting the roof and sides of the "road or working place as may be "necessary for keeping the road or "working place secure: . . ."

Per Holroyd Pearce L.J. and Pilcher J. That in considering whether the manager, in compliance with his duty under section 48, had taken "such steps . . . as may be necessary," the matter had to be decided in the light of all the facts which were known or ought to have been known at the time when the decision to take those steps fell to be made and when it was still possible for those steps to be taken; an immediate notional failure to take steps could not be imputed to the manager at the moment of an unforeseeable occurrence without giving him any time in which steps could physically be carried out to remedy it (post, pp. 332, 336).

Wright v. *Jenkins* (1958) 43 Cr.App.R. 17 approved.

Per Holroyd Pearce L.J. It was slightly more difficult to show that avoidance of the breach was "impracticable" under section 157 of the Act of 1954, than to show it was not "reasonably practicable" under section 102 of the Coal Mines Act, 1911, and the difference between the two phrases, though hard to define, might in a border-line case produce a different result (post, p. 332).

Per Lord Morris of Borth-y-Gest. The relevant time to inquire whether the manager had taken such steps as were necessary for keeping the road or working place secure against accidental falls was first, the time immediately prior to the insecurity and secondly, the period immediately following it, when there would be an obligation to replace insecurity by security; a step which was necessary was nonetheless necessary even though it was not known to be necessary and even though no one was negligent in not knowing it was necessary; in considering whether the necessary steps had been taken the competence or perceptiveness of a particular manager was irrelevant (post, pp. 325, 326).

If the necessary steps were not taken, the defence under section 157 [2] might be available if it could be proved that it was impracticable to avoid or prevent the contravention; that which was necessary might be something more than that which was practicable (post, p. 326).

Edwards v. *National Coal Board* [1949] 1 K.B. 704; 65 T.L.R. 430; [1949] 1 All E.R. 743, C.A.; *Gough* v. *National Coal Board* [1959] A.C. 698; [1959] 2 W.L.R. 658; [1959] 2 All E.R. 164, H.L.; *Marshall* v. *Gotham Co. Ltd.* [1954] A.C. 360; [1954] 2 W.L.R. 812; [1954] 1 All E.R. 937, H.L. considered.

Decision of Thesiger J. [1960] 1 W.L.R. 67; [1960] 1 All E.R. 108 affirmed.

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[2] S. 157: "It shall be a defence "in any legal proceedings to recover "damages and in any prosecution, in "so far as the proceedings or prosecution are or is based on an allegation "of a contravention, in relation to a "mine . . . to prove that it was "impracticable to avoid or prevent "the contravention."

Appeal from Thesiger J.

The plaintiff, Brown, was employed by the defendants, the National Coal Board, as an electrician at their Crofton Mill Colliery at Blyth in Northumberland. On April 8, 1958, a damaged tub was being sent up a drift at the mine on an endless haulage when it came off the rails, knocked away a concrete prop supporting a roof girder which thereupon fell down at one end and a piece of stone at once fell from the roof. There was a light fitting in the centre of the partly fallen girder which had to be removed before a supporting prop could be inserted. The overman in charge sent a boy to tell the plaintiff (who had finished his work and was returning to the shaft bottom) that he wanted the fitting removed. The plaintiff returned and, unknown to the overman, started to work on the fitting when another stone fell from the same part of the roof and injured him.

The plaintiff brought an action against the National Coal Board alleging that his injuries were caused by breach of statutory duty and negligence. The defendants, inter alia, alleged that the accident was attributable to the plaintiff's own negligence. Thesiger J. found that neither the defendants nor their servants were negligent nor was there any breach of statutory duty and dismissed the plaintiff's claim. The plaintiff appealed on the ground that the judge was wrong in failing to find that there was a breach of section 48 of the Mines and Quarries Act, 1954.

The facts are more fully stated in the judgment of Lord Morris of Borth-y-Gest.

G. S. Waller Q.C., *J. A. Baldwin* and *Paul Kennedy* for the appellant plaintiff. If section 48 of the Mines and Quarries Act, 1954, imposes an "absolute duty"—in the sense of insurance duty—on the manager of the mine, then on the facts here there has been a prima facie breach and the defendants must show that it was impracticable to avoid or prevent it: section 157. On the assumption that the place where the accident occurred was a road, the section in terms requires the manager to "keep" the road secure, and that duty is a continuing one. Section 48 of the Act of 1954 takes the place of section 49 of the Coal Mines Act, 1911, and puts the responsibility for a breach personally on the manager, but it does not relax the duty imposed by section 49 of the Act of 1911. The authorities show that section 49 put the mineowners into the position of insurers and that "secure" in that section meant free from the danger of accidental and unintended falls: see *Gough* v. *National Coal Board*,[3] and in particular Lord Reid and Lord Denning. The same definition applies to "secure" in section 48 of the Act of 1954.

[Lord Morris. Assuming that the duty is absolute, do you not have to show what the steps are which the manager failed to take?]

No; but although it is not necessary to specify the steps, it is suggested that the tub should not have been sent up the haulage, or, that if it was, precautions should have been taken to prevent it coming off the rails. All that the plaintiff has to show under section 48 is that the place where he was injured was a working place or road and that it was insecure. If it was, it follows that the manager has not taken the necessary steps.

[Lord Morris. If there was the safest possible road and an enemy got in and pulled away a prop and the mineowners could not stop him getting in, would they be responsible?]

Yes, unless they can prove that it was impracticable to prevent the breach. Any kind of accidental fall short of, e.g., an atomic explosion, is one that prima facie creates a breach on the part of the mineowner, although it may be easy to show that it was not reasonably practicable to prevent it: *Edwards* v. *National Coal Board*.[4] At a time when the trend of legislation relating to master and servant in industry has been to tighten up the duties of the master and give the servant greater protection it would be strange if Parliament had relaxed the duty on mineowners.

From 1872, the duty in coal mines was that "so far as may "be reasonably practicable . . . the roof and sides of every . . . "road . . . and working place shall be made secure": section 51, rule 16 of the Coal Mines Regulation Act, 1872. In the Act of 1911 the same obligation was re-enacted, but the duty and the defence were separated: see section 49 and section 102 (8) of that Act. From 1911 until the Act of 1954 the duty was absolute subject to the possible defence that it was not reasonably practicable to prevent a breach.

In metalliferous mines, there was no duty to make the roof and sides secure until 1938, but thereafter the duty was the same as it had been from 1872 to 1911 in coal mines: see section

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[3] [1959] A.C. 698, 711, 718; [1959] 2 W.L.R. 658; [1959] 2 All E.R. 164, H.L.

[4] [1949] 1 K.B. 704; 65 T.L.R. 430; [1949] 1 All E.R. 743, C.A.

23 of the Metalliferous Mines Regulation Act, 1872, as amended by the Metalliferous Mines General Regulations, 1938, reg. 7 (3). In *Marshall* v. *Gotham Co. Ltd.*[5] Lord Tucker, with whom Lord Cohen agreed, thought that the onus under section 23 as amended was on the defendants, so that it would appear that even prior to 1911 in a coal mine the onus was on the owner.

There are five variations between section 48 of the Act of 1954 and section 49 of the Act of 1911: (1) In section 48 the duty is imposed personally on the manager; in section 49 it was impersonal. (2) In section 48 any road or working place must be kept secure, and not the roof and sides which were included in section 49. (3) In section 48 the road or working place is to be kept secure not merely by supporting the roof and sides but also by controlling the strata. (4) In section 48 places are to be "kept" secure as opposed to "made" secure in section 49. (5) Section 48 does not include a prohibition against travelling or working in a place which has not been made secure as did section 49. Section 48 does not contemplate, as section 49 did, that a person would go to a place which was insecure for the purpose of repairing it. In that sense section 48 is more absolute because there is a breach wherever there is insecurity.

While the wording of section 48 is not as clear as that of section 49, one approach to its interpretation is a consideration of the advances in mining engineering since 1911. The idea of controlling strata was in its infancy in 1911. If one wished to incorporate into the old section 49 provisions for the control of strata, the improvement of security and the imposition of those duties on the manager personally, section 48 is just the type of section one would expect. The plaintiff does not shrink from the proposition that if there is a lack of security from whatever cause, there is a breach of section 48. The reason for the alterations in section 48 is primarily to cut down accidents, but also to give miners the right to damages if accidents do occur.

Section 49 of the Act of 1954, which imposes a duty to provide systematic support, only applies to coal, shale and fireclay mines. Although at first sight it might appear that the duties imposed by section 48 are relaxed because of the duty in section 49, that cannot be so when it does not apply to metalliferous mines. If section 49 is not complied with then there is also a breach of section 48. But if section 49 is complied with and the manager does lay down rules for systematic support, and then there is a withdrawal of support, the manager is not liable under section 49 but under section 48.

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[5] [1954] A.C. 360, 374 et seq.; [1954] 2 W.L.R. 812; [1954] 1 All E.R. 937, H.L.

There are many sections in the Act of 1954 similar to section 48 imposing absolute duties: viz., sections 37 (6) (*a*) and 55 (1). Other sections impose the duty to take steps impersonally (viz., section 41 (2)) and others impose duties on the manager to ensure that certain things are done: e.g., section 74 (1), which requires the manager to ensure that the giving off of dust is minimised.

[HOLROYD PEARCE L.J. That section is against your submission that section 48 is an insurance section.]

That is not a simple insurance section, for it does not impose an absolute duty but requires the manager to do as well as he possibly can. Section 82 (1), which is in similar terms to section 14 of the Factories Act, 1937 (and therefore should be similarly construed) imposes an absolute impersonal duty. Section 82 (2) requires the manager to ensure that fencing is provided.

[HOLROYD PEARCE L.J. What is against you is that some sections in terms require the manager to ensure that certain things are done and yet you say that means the same as taking the necessary steps.]

The fact that "ensure" is used in some sections may be against the plaintiff's argument, but the number of ways in which the duties are imposed in the Act are many.

In *Peacock* v. *Dorman Long (Steel) Ltd.*,[6] where a girder had fallen, Edmund Davies J., who had Thesiger J.'s decision in the present case cited to him, adopted the construction here contended for, and held that the place was not secure. The fact that the obligation argued for appears to be onerous is no reason for the law not to have imposed it. [Reference was made to *Galashiels Gas Co. Ltd.* v. *O'Donnell.*[7]] The fact that the obligation may have been increased by the substitution of "keeping" for "making" does not make the duty less than absolute. In *Hayes* v. *National Coal Board*[8] and *Jackson* v. *National Coal Board*[9] the man who was injured was the man who caused the insecurity. In the present case the plaintiff was an innocent party, having come on the scene after the insecurity arose. In any event, having regard to the subsequent decision of *Gough*,[10] *Hayes*[11] was wrongly decided. So, too, was *Wright* v. *Jenkins*,[12] although the case was approved by Winn J. in *Winkler* v. *National Coal Board*[13]—the question whether section 48 imposed an absolute duty was not argued before him, and he decided *Winkler*[13] on a different point although he held that section 48 did not create an absolute duty.

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[6] Unreported, June 13, 1960, York Assizes.

[7] [1949] A.C. 275; 65 T.L.R. 76; [1949] 1 All E.R. 319, H.L.

[8] Unreported, April 29, 1952, Hallett J. at Leeds Assizes.

[9] [1955] 1 W.L.R. 132; [1955] 1 All E.R. 145.

If section 48 imposes an absolute obligation, and there is a breach of it, it is for the defendants, if they are to succeed, to show that it was impracticable to prevent the contravention. Under section 102 (8) of the Act of 1911 the defendants would have had to prove that it was not reasonably practicable to prevent it. The question is whether the substitution of "impracticable" in section 157 of the Act of 1954 for "not reasonably practicable" has altered the defence. The onus of proving that something was not "reasonably practicable" was a heavy one: *per* Lord Oaksey, Lord Reid and Lord Tucker in *Marshall* v. *Gotham Co. Ltd.*[14] and *Edwards* v. *National Coal Board*.[15] "Impracticable" in the Shorter Oxford Dictionary is defined as "Not practicable; that cannot be carried out or done; "practically impossible; that cannot be put to use or practically "dealt with." "Practicable" is defined as "Capable of being "carried out in action; feasible."

To summarise: (1) "Secure" means secure against unintended and accidental falls: see *per* Morris L.J. in *Gough* v. *National Coal Board*,[16] "when a man is either on a travelling road "or at a working place, that which is on top of him and that which "is around him shall be made so that it does not fall upon him." (2) Section 48 means that the manager shall ensure that the road or working place shall be kept secure. If the section imposes some other duty to make the place as safe as reasonable care will permit (*Naismith* v. *London Film Productions*[17]) it is indistinguishable from the common law. It is extraordinary if the legislature has enshrined, in a section of this length, that which is the common law of the land. It is equally extraordinary if the duty has been relaxed from that imposed by section 49 of the Act of 1911. (3) As soon as there is insecurity the place is no longer being kept secure and there is a prima facie breach. (4) If this insecurity was caused extraneously the defendants, if they wish to rely on section 157, must show two things: (i) that it was impracticable to avoid or prevent or guard against the extraneous cause which caused the breach; (ii) that it continued to be impracticable from the moment of the occurrence of the extraneous cause to the moment of the accident.

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[10] [1959] A.C. 698.

[11] Unreported, April 29, 1952, Hallett J.

[12] (1958) 43 Cr.App.R. 17.

[13] Unreported, May 4, 1960, at Leeds Assizes.

[14] [1954] A.C. 360, 370, 372–3, 374–5.

[15] [1949] 1 K.B. 704.

[16] [1959] 1 Q.B. 189, 197; [1958] 2 W.L.R. 735; [1958] 1 All E.R. 754, C.A.

[17] [1939] 1 All E.R. 794, C.A.

Geoffrey Veale Q.C. and *D. B. Fenwick* for the defendants, the National Coal Board. The fallacy in the plaintiff's submissions arises from the use of the phrase "absolute duty." In one sense all statutory duty is absolute because one cannot avoid it. In another sense, an absolute duty is an all-embracing duty and the section an insurance section. To use "absolute duty" in that sense in construing section 48 is not correct. The duty imposed by section 48 is for the manager to take such steps in the defined categories of the section as an efficient manager in the light of his own experience and the light of generally accepted mining practice would have taken. *Wright* v. *Jenkins*,[18] approved by Winn J. in *Winkler*,[19] is adopted as part of the defendants' argument. It is the manager who must be in breach, because the duty is a personal one.

Section 49 of the Act of 1911 taken alone was an insurance section imposing an absolute duty to make secure at large. If anything was not made secure, there was a breach and there could be a prosecution: see section 101 (2). Section 48 is not nearly so wide. Had it been intended that the duty in section 48 should remain the same as that under section 49 of the Act of 1911 similar words would have been used, as was done when section 38, relating to the security of shafts, was transferred to the Act of 1954: see section 30 (1). Similarly, had it been intended that the manager should "ensure" or "secure" security, those words would have been used: compare sections 51 (3), 55 (5), 56 (2), 61 (1), 66 (7), 74 (1) and 82 (2).

The use of the words "to take steps" indicates a subjective element, a duty to do something which involves the use of the manager's mind. But he only has to take steps in two ways—by controlling the strata and by providing support; although those are not the only possible steps which he could take. It is now understood that it is impossible to prevent strata moving, and that it is inevitable that there should be a possibility of some insecurity. The reference to "controlling movement of the

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[18] 43 Cr.App.R. 17.

[19] Unreported, May 4, 1960.

"strata" in section 48 requires long-term planning only. The other step to be taken is the support of the roof and sides, which is a mining term meaning support by the provision of props, bars, girders and arches. There is no duty under section 48 to prevent tubs going off the rails, whether they do so negligently or not.

[Holroyd Pearce L.J. If a tub knocked down props every day, would the duty to support the roof and sides be fulfilled?]

Yes.

[Holroyd Pearce L.J. And if a man knocked a prop down every day?]

If a reasonably foreseeable attack is going to be made on the supports, provision must be made for those attacks for otherwise the duty of support would not be fulfilled. "Necessary" is what is needed or needful. The question whether it is necessary is something that must be judged immediately before the accident. It follows that the duty under section 48 must be different from a duty to ensure. The subjective thinking process is a continuing one which must take place all the time and requires one to ask oneself: Is it necessary to do anything further? The fact that it subsequently turns out that it was necessary to do something does not mean that it was necessary beforehand. Under section 48 the manager is not liable for something unforeseeable, which no expert in the world would suspect, though it would be different if the duty were to ensure. Subsection (2) of section 48 shows that the duty contemplated under subsection (1) is a duty of efficiency. That is why "efficient," which is used to include the best mining practice, was substituted in the preliminary proposition taken from *Wright* v. *Jenkins*,[20] instead of "competent" which was used in that case. [Reference was made to *Harding* v. *Price*.[21]]

The fact that section 48 does not provide for repair work or exploration, as did section 49 of the Act of 1911, shows that the duty is not so extensive now as it was. The manager must be able to deal with emergencies by way of repair without committing a breach. The duty in section 48 is to take steps, not to ensure the result. If the duty is to ensure the result, the steps would be quite irrelevant. There is nothing surprising in the duty being relaxed when Parliament imposes it personally on the manager. There are two examples of the relaxation of a duty in the Act of 1954; sections 36 (1) and 40, where "the manager shall not

[20] 43 Cr.App.R. 17.

[21] [1948] 1 K.B. 695, 701; 64 T.L.R. 110; [1958] 1 All E.R. 283, D.C.

"'permit.'" "Permit" imports a state of mind: *James & Son Ltd.* v. *Smee.*[22] A breach of section 48 constitutes a criminal offence, and that should be borne in mind if there is any ambiguity. Had section 48 been intended to require the manager to occupy himself with day to day support it would have said so. Section 49 is intended to do that. No breach of section 49 was ever alleged although it might have been appropriate.

[LORD MORRIS. Have we to do any more than construe the new section. Should we look at the old section?]

The wording and meaning of section 49 of the Act of 1911 may be examined, and on finding the same subject dealt with in section 48 of the Act of 1954 in an entirely different way, one may ask why? If there is a very high duty and then the wording is changed, the present duty must be lower, for otherwise there would be no point in changing it. If there is a duty to keep secure, it must be lawful to take steps to keep secure, and, therefore, the fact that a man was in the danger area carrying out repairs, was not a breach of section 48 although he might be negligent if he went there without a supporting prop having been put up: see *Walsh* v. *National Coal Board* [23] for the implication in section 49 of the Act of 1911. "Secure" in *Gough's* case [24] was held to mean secure against accidental falls. In construing "secure" one can draw an analogy with cases decided under "securely fenced" under the Factories Act. If "securely "fenced" means, as was decided in *Burns* v. *Joseph Terry & Sons Ltd.*,[25] that a measure of foresight is involved, there is no reason why "secure" in coal mines should not also have an element of foreseeability in it. The paragraph relating to "securely fenced" in Redgrave's Factories, Truck & Shops Acts, 19th ed., p. 37, at (b), is adopted as part of the defendants' argument. In *Jackson's* case,[26] "secure" was held to mean not dangerous by reason of liability to fall. That approach is not precluded by anything decided in *Gough's* case.[27] In *Walsh*,[28] the emergency having arisen, the necessary and proper steps were being taken to make the place secure.

It is difficult to ascertain what duties are imposed by section 48 which would not be excluded by "impracticable" in section

[22] [1955] 1 Q.B. 78; [1954] 3 W.L.R. 631; [1954] 3 All E.R. 273.

[23] [1956] 1 Q.B. 511; [1955] 3 W.L.R. 829; [1955] 3 All E.R. 632, C.A.

[24] [1959] A.C. 698.

[25] [1951] 1 K.B. 454; [1951] 1 T.L.R. 349; [1950] 2 All E.R. 987, C.A.

[26] [1955] 1 W.L.R. 132.

[27] [1959] A.C. 698.

[28] [1956] 1 Q.B. 511, 522.

157 on the facts of the present case. There is no difference between "impracticable" and "not reasonably practicable"; but if there is, it is purely a matter of degree: see *per* Lord Reid in *Marshall* v. *Gotham Co. Ltd.*,[29] that there might be precautions which were "practicable" but not "reasonably practicable." If it is more difficult to show that something is "impracticable" than "not reasonably practicable," then it was more difficult to defend oneself against a criminal prosecution than a civil action under the Act of 1911: see subsections (3) and (8) of section 102. [Reference was made to *Atkinson* v. *Shaw*.[30]] There is no evidence of any steps which the manager has failed to take; but if the manager was in breach, then it was not only "impracticable," but physically impossible for him to prevent it. The real cause of the accident was the plaintiff's own negligence. He knew that he should not have gone under the unsupported roof.

To summarise: (1) Section 48 is not absolute in the sense that it does not impose on the manager a duty of ensuring that the roof is secure at all times. The duty is taken from the judgment in *Wright* v. *Jenkins*,[31] with slight alterations. The steps which the manager is required to take are such steps in the defined categories as would from time to time be seen to be necessary on an expert and careful appreciation of the situation but without hindsight. The question whether the manager has taken such steps must be judged in the state of information and technical knowledge available immediately before the accident, all proper steps to make such information and knowledge available having been taken.

[Pilcher J. Is there any intermediate duty between the absolute duty and the common law duty?]

There is nothing against a statutory duty being substantially the same as a common law duty: *Levesley* v. *Thomas Firth & John Brown Ltd.*[32] It is not helpful to consider whether the statutory duty is the same as the common law one: Lord Reid in *Gotham's* case.[33] In many cases it would be the same. (2) "Secure" in section 48 means secure from the danger of the liability to fall, but it does not include security from falls, which are due to attacks on supports which are sufficient at the time of the attack, although there may be liability for the attack. (3) If, under section 49 of the Act of 1911, it was necessary to imply the lawful taking of steps to make secure, it is equally necessary to imply it in section 48 of the Act of 1954: *Walsh* v. *National Coal Board.*[34] (4) On the facts of the present case there is no contravention of section 48. (5) In the alternative, if the question of section 157 arises, there is little difference if any between "impracticable" and "not reasonably practicable." (6) Whatever "impracticable" means, it was impracticable for the manager to avoid the contravention of section 48, if any. It is conceded by the plaintiff that there was no contravention up to the moment of the tub striking the prop. It was not physically possible for the manager, who was not there, to take any steps, to make any decision or give any orders. In any event, the evidence was sufficient to show impracticability. (7) The accident was the plaintiff's own fault in going under a dangerous roof when he knew he should not do so.

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[29] [1954] A.C. 360, 373.

[30] [1915] 2 K.B. 768; 31 T.L.R. 421, D.C.

[31] 43 Cr.App.R. 17.

[32] [1953] 1 W.L.R. 1206; [1953] 2 All E.R. 866, C.A.

[33] [1954] A.C. 360, 373.

J. A. Baldwin in reply. Section 48 contemplates the security of the road and working place for the safety of the men working in the mine. If it is to be said that the duty is not to secure the result, there is no legislation providing for security in the Act of 1954. If the defendants are right, there is no general duty of support at all. The obligation under section 48 is to keep the working place secure. If it is kept secure there is no occasion for sending workmen in to make it secure and *Walsh's* case[34] is irrelevant.

Lord Morris of Borth-y-Gest. This is an appeal from the judgment of Thesiger J. dismissing the claim which the plaintiff, Brown, made against the National Coal Board, the defendants. The plaintiff was injured on April 8, 1958, while employed by the National Coal Board. He was an electrician, and on the day in question he was working underground at the Crofton Mill Colliery at Blyth, when, in circumstances which I will describe, a piece of stone fell from the roof of a haulage road, struck the plaintiff and caused him physical injuries. If, in the result, he is entitled to recover damages from the National Coal Board, the amount of such damages has been assessed by the judge at the sum of £1,137 odd.

A location plan used in the litigation shows a road leading to and from the shaft bottom. That road has been styled "the "road in Low Main." Leading out of that road is another which is styled "the drift to Beaumont." The Beaumont seam is at a lower level than the Low Main seam, and, as a result, the drift to Beaumont has for some of its length a gradient down towards the Beaumont coal face. The drift to Beaumont is undoubtedly a "road" within the meaning of that word as it is used in the Mines and Quarries Act, 1954. That road has two parallel sets of rails, along which tubs can proceed. The progress of the tubs results from their being attached to an endless wire rope which passes around drums, whose revolutions are electrically operated. In ordinary operation, tubs filled with coal move along the left-hand set of rails leading away from the coal face, and empty tubs move along the other set of rails running towards the face. The roof is held by a series of girders resting under the roof at right-angles to the direction of the road. The girders are at each end supported by two concrete posts. Under the system that was specified for this mine, the posts should have been at intervals of four feet. In fact, the distances separating some of the girders near to the place where the plaintiff was injured were not quite placed at the specified distances, but for the purposes of this appeal it has been disclaimed that there is any relevance in this circumstance.

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[34] [1956] 1 Q.B. 511.

On April 8, 1958, the plaintiff, with a mate, had been working underground near to the Beaumont face. Having completed his assigned work, he set off to walk to the shaft bottom. His course was along the drift to Beaumont and then along the road in Low Main. He was nearly at the end of his time in the shift. When he got to the bottom of the drift to Beaumont, haulage was not taking place. In pit terminology, the haulage was standing. Had that not been so, he would not have been able to proceed. As it was, he was able to walk up the drift. The reason why the haulage was standing was that four tubs had been derailed. The plaintiff saw one tub which was off the rails and which had been, as he put it, bashed or concertinaed or widened. The plaintiff proceeded on.

He went up the drift to Beaumont, he got into the road in Low Main and he began to walk towards the shaft bottom. He was then overtaken by a boy named Richardson. Richardson had been sent by Simpson, who was an overman employed at the Crofton Mill pit. Richardson was sent to recall the plaintiff. The reason for his recall was that, after the plaintiff had proceeded up the drift to Beaumont, there had been another incident. What had happened was that the tub which the plaintiff had seen was put on the rails and was attached to the haulage wire and was then sent up the drift to Beaumont. It was being sent away because it had been damaged. But before it reached the junction of the drift to Beaumont and the road in Low Main, it went off the rails again. The result that time was that after leaving the rails, the tub, being still attached to the moving endless wire rope, hit the concrete support holding one of the roof girders. Being deprived of support at one end, the girder came partly down at that end, and a thin panel of stone fell down from the roof. In the centre of that girder there was an electric light fitting. Some other girders in the vicinity had similar fittings. Because something had fallen on to the bell wires, the haulage stopped. This would be known to all who were near, and Simpson the overman, who had been at the point of the first derailment, went up to the scene of this new occurrence.

Simpson saw the situation and he saw the displaced girder. It was resting on rubble by the side of the wall. What he then decided to do can best be described by referring to his own words, for his testimony was accepted by Thesiger J. [His Lordship read the evidence of Simpson in which he said that he sent the lads to get long timber because he realised that the girder needed temporary support before it was lifted to make it safe; the lamp was still alight on the fallen girder and had to be removed in order to put a middle prop in to secure the girder; he sent a boy, Richardson, to go for the electrician and tell him that he, Simpson, wanted the lamp removed before he went to the bank. His Lordship continued:]

As a result of the message, the plaintiff did in fact retrace his steps. At to what happened thereafter, there was a conflict of evidence. There was a difference between what the plaintiff said and what Simpson said. The plaintiff said that he spoke to Simpson and received an instruction from Simpson to remove the fitting. Simpson said that he did not know that the plaintiff had arrived and never gave him any instruction, and that the plaintiff did not ask him (Simpson) what was needed. That conflict was resolved by the judge in favour of Simpson. The stone that had fallen when the girder was displaced was being dealt with by one of the men who arrived on the spot. What the plaintiff said, as I have indicated, was that he received a direct instruction after proceeding to the place where the girder was partly down to deal with the electric light fitting. He said in evidence: "When I got there I saw the girder and stone "and some men breaking the stone on this girder, one end was "down and there was the stone and men breaking the stone off.'' He said that Simpson asked him to loosen the light fitting in order to get the girder moved, and he said that when he got the orders from Simpson he started to loosen the light fitting. He was asked what he did and answered: ''I continued with '' doing my job, what he told me to do, take the fitting off the '' girder, and I put my bag of tools on the bottom, took the '' spanner out, looked at the fitting first to see what spanner I '' wanted, and I took it out of my bag and I was busy with that '' when the stone came down.''

There was a further fall of stone and it is beyond question that a stone some four feet six inches to five feet long, being nine inches in thickness at one end tapering to a point, did in fact fall and did cause injury to the plaintiff.

Simpson's evidence, as I have indicated, was that he did not know that the plaintiff was there and gave no instructions. What Simpson was doing can again be best described in his own words. [His Lordship read Simpson's evidence in which he said he was taking the measurement of the roof to fit the temporary props on either side of the girder when the stone fell and hit the plaintiff; he did not know that the plaintiff had arrived at the scene; he had had to tell the men to stand back and so far as he knew no one was in the danger area except himself when the second stone fell. His Lordship continued:] In those circumstances, the plaintiff brought an action against the National Coal Board and by his statement of claim he alleged that his injuries were caused by breach of statutory duty, negligence, and breach of duty of the defendants or their servants. There were several particulars under that general allegation. In the first place, a breach of section 48 (1) of the Mines and Quarries Act, 1954, was pleaded. Then there was an allegation of breaches of section 51 (3), section 53, and regulation 12 of the Coal and Other Mines (Support) Regulations, 1956. Then there was this general plea of negligence: '' The defendants and their servants '' were negligent and the defendants were in breach of their duty '' to the plaintiff to provide a safe place of work in that the '' plaintiff's working place was not properly supported as afore- '' said, and no steps were taken to set a temporary prop or '' temporary props for safety before the plaintiff was instructed '' to go into the danger area to remove the said electric light '' fitting. The overman instructed the plaintiff to go into an '' area which he well knew was dangerous, he failed to prevent the '' plaintiff from going there, and he took no or no proper steps to '' ensure that the plaintiff was not exposed to danger after there "had been a fall of roof in the main roadway. The plaintiff "will further rely upon the second fall of roof in the circum-"stances described as being of itself sufficient evidence of the "defendants' negligence."

Among other matters it was pleaded in the defence that the appellant was himself guilty of negligence.

The judge, as I have said, decided the issue of fact as between the plaintiff and Simpson in favour of the Coal Board. I read a sentence or two of the judgment: "My conclusion is that "Simpson is right: that he did not know the plaintiff had "turned up; that the plaintiff knew from the message why he "was wanted and went forward to the girder and the fitting "'out of his own common sense,' like the men who started "breaking the stone, and because, like everyone else, he was "anxious to get the coal moving and the clearance job done. "I hold that Simpson is right, and the plaintiff is wrong; that "no question was asked and no answer given and that Simpson "did not know that the plaintiff had arrived back. On these "findings of fact I have to deal with the plaintiff's claim. I think, "on my finding of fact, it must be approached as if for the "words in paragraph 2 of the statement of claim 'The plaintiff "'was instructed to remove' I substituted the words 'The "'plaintiff was so called back in order that he would be avail-"'able in due course to remove.'"

On that finding of fact, the judge proceeded to deal with all the issues raised and—leaving aside for the moment the allegation in reference to section 48 of the Mines and Quarries Act, 1954—the judge found in favour of the Coal Board in regard to all the other matters.

Mr. Waller, appearing for the plaintiff at the trial, suggested that what Simpson was trying to do and was setting out to do, was to take down the girder that was hanging down in order to get it out of the way, so that coal could be got moving. He suggested that that was wrong procedure. It is manifest that that submission and that line of approach did not in any way succeed. Therefore, all the allegations under section 51 (3) and section 53 of the Act and regulation 12 of the Coal and Other Mines (Support) Regulations, 1956, failed.

In regard to section 48, it is, I think, difficult to summarise what was the judge's conclusion, and I must therefore read the sentences of his judgment dealing with that section[1]: "Now

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[1] [1960] 1 W.L.R. 67, 77; [1960] 1 All E.R. 108.

"section 48 places a duty on the manager of the mine. That duty "is to deal with controlling the movement of the strata in the "mine. That duty is imposed in relation to roadways and working places. All this points to somewhat long-term strategic "planning as opposed to short-term tactical measures of repair. "The latter measures might have to be taken by the men on the "spot immediately upon the occurrence of an emergency; the "emergency might be due to the knocking away of an effective "support by a third party. It is a defence to prove that it was "impracticable for the manager to avoid or prevent a contravention of that long-term though continuing duty. I do not believe "Parliament intended that the fall of a stone in the circumstances of this case should be held to prove a contravention of "the duty imposed by section 48, and that section 157 should "then be practically useless by way of defence in such circumstances. In other words, I do not believe Parliament intended "to impose liability on a manager to pay damages for injury "caused almost immediately after the knocking away of a "support, by the fall of a stone from the roof of a temporarily "blocked roadway, upon someone who (without the knowledge of "anyone on the spot who mattered) went under the roof while "such steps as were necessary were being taken to keep the roof "secure. One may hold either, in those circumstances, that the "fall of the stone was not sufficient evidence of a contravention "of his duty by the absent manager, or that it was impracticable "for him to avoid or prevent any contravention of the statutory "duty that could fairly be inferred from that fall. When the "roadway that had been effectively supported was deprived of its "support, I think that one must ask oneself what step the "manager then failed to take that was practicable for him to "take, and that was necessary to make the roof secure in the "sense of preventing the fall of the stone that hit the plaintiff. "I cannot see on the evidence that the manager omitted any "step that was practicable. It was, indeed, impracticable for "him to act to avoid the fall. The plaintiff went into a place "where the roadway was blocked, and I reject the evidence that "he was specifically set to work at that place. At the time he "was injured, the defendants, by their servants or agents, were "taking such steps as were necessary for keeping the roof secure. "The plaintiff was injured because he, unknown to the defendants, tried to assist in that work."

The claim of the plaintiff, therefore, wholly failed, and appeal is now brought to this court. The first ground of appeal is that the judge was wrong in holding that there was no contravention of section 48 of the Mines and Quarries Act, 1954. [His Lordship read section 48 (1) and continued:] I do not, for present purposes, read the proviso. Subsection (2) is: "It shall be the duty of the "manager of every mine to take such steps as may be necessary "for securing that he is at all material times in possession of all "information relevant for determining the nature and extent of "any steps which it is requisite for him to take in order to "discharge efficiently the duty imposed on him by the foregoing "subsection."

It is necessary to remember the presence of section 49, which begins with the words: "Subject to the provisions of this section, "in every mine of coal, shale or fireclay there shall be provided "and maintained systematic support for the roof and sides "of . . ."—and then follow four categories of place, the first being: "(*a*) every place where any mineral is worked," and the last being "(*d*) every length of road in which persons work "otherwise than occasionally or for short periods." Subsection (5) is: "For the purposes of this section references to provision "and maintenance of systematic support shall, as respects any "mine, be construed as references to provision and maintenance "of support in accordance with a system specified in rules to be "made by the manager of the mine, being a system consistent "with the proper control of movement of the strata in the mine."

[His Lordship read the relevant words of section 157 and continued:] I may say that the Act defines what contravention means. Section 152 is the section dealing with offences.

It is to be observed that section 48 imposes a duty upon the manager of a mine. The pleading in this case did not, in terms, refer to the manager, but no point arises in regard to that and I need not pause to read section 159, though it has relevance in this connection. The plaintiff did not give any particulars of the breach of section 48, of the failure to take steps, save that the concluding words of the general plea of negligence in the statement of claim, which I have read, show that the plaintiff was relying upon the second fall of roof, in the circumstances described, as being of itself evidence of negligence.

Before considering the construction of section 48, on which reliance is placed by the plaintiff, certain other matters can be stated. Although it is said that there was a breach of section 48, it is not now contended, in view of the findings of the judge, that the

National Coal Board were negligent. It is not suggested that the drift to Beaumont, the road, was other than secure before the errant tub displaced the support. If it has not been expressly conceded that the road was secure, it has at least been assumed for the purposes of the case that it was secure. It is not suggested that there was negligence in respect of the displacement of support. Nor is it suggested that it was negligent to have sent the damaged tub up the drift. Furthermore, it is nowhere suggested that there was any negligence, in the ordinary sense, on the part of the manager. All that is said is that there was a breach of section 48.

We have had most careful and helpful submissions from both counsel. Mr. Waller, for the plaintiff, says that there was a breach of section 48. He says that such breach occurred when, following upon the displacement of support, the road became insecure. He goes on to say that it was not impracticable to have avoided the contravention; for he says, as I follow it, that the tub need not have been sent up at all—though he is not saying it was negligent to have sent it up—and that if it had not been sent up, there would have been no displacement. The evidence appears, however, to be against that part of Mr. Waller's contention. [His Lordship referred to some of Simpson's evidence and continued:] It seems to me that that evidence shows that the support was only displaced after the tub had gone off the rails. The tub had gone 120 or 130 yards up the drift and the displacement of the support was not caused merely by the circumstance that the tub had been damaged and flattened out. It does not seem to me to be shown that the displacement of the support occurred other than after the tub, for the second time, went off the rails. Furthermore, Simpson's evidence was that to have sent the broken tub up was all that could have been done.

In those circumstances Mr. Waller, for the plaintiff, rests his case upon section 48 of the Act and submits that there was a contravention of it. It therefore becomes necessary to consider the meaning of that section. We have had a very careful analysis of the sections of the new Act of 1954, and a comparison between those sections and the sections in the Coal Mines Act, 1911. Mr. Waller pointed out that the old Act was the subject of certain judicial interpretations, and he submitted that it is very unlikely that Parliament would have intended by the new Act to impose obligations of less force than those previously imposed. The process of speculation as to why changes of language have been made is one that, in my judgment, should not be pressed too far. It is dangerous, I think, to construe the new words by considering what the old words meant, and then debating whether Parliament would be likely or not likely to make any, or any serious, changes. Parliament has legislated in the terms of this new Act and our task, as I conceive it, is to construe the words of the new Act in their context, deriving help in interpretation if it is shown that phrases that have in the past received authoritative interpretation have again been used in the new Act.

Section 49 of the Act of 1911 reads: "The roof and sides of "every travelling road and working place shall be made secure, "and a person shall not, unless appointed for the purpose of "exploring or repairing, travel on or work in any travelling road "or working place which is not so made secure."

In reference to that Act we have in mind the decision in *Edwards* v. *National Coal Board*[2] and the important passages, to which reference has often been made, in the judgment of Tucker L.J. Mr. Waller submits that section 48 of the Act of 1954 creates what he calls an absolute liability. He says that the words in the section mean that the manager shall ensure that the road or working place shall be kept secure. He submits that as soon as there is insecurity then the road or place is no longer being kept secure, and that prima facie there is a liability if any injury is caused. So in this case he submits that when the support of the girder was knocked away, there was then a breach of statutory duty. He says that there was then a contravention of section 48 and that the manager (or the National Coal Board, the manager's employer) could only avoid liability to pay damages in respect of the personal injuries occurring after that contravention, if he or they could rely on section 157.

Mr. Veale, on the other hand, appearing for the National Coal Board, submits that section 48 is not absolute in that it does not impose a duty on the manager of ensuring that the roof is secure at all times. Mr. Veale goes on to submit that the steps which the manager is required to take are such steps in the defined categories as would from time to time be seen to be necessary on an expert and careful appreciation of the situation, but without hindsight. He submits that the question whether the manager has taken such steps must be judged by having regard to the state of information and technical knowledge available immediately before the accident, all proper steps to make such knowledge and information available having been taken. I do not set out all Mr. Veale's other contentions, but it is necessary to add that he further submits that the word "secure" refers to danger from liability to falls, but not including falls due to attacks on supports which were sufficient up to the time of attack. He says that there may be liability for such attacks if negligence is shown, but that such liability would not be under section 48. On the facts of this case, he submits that there was no contravention of section 48 and, in any event, he submits that the accident resulted from the plaintiff's own fault in going under a dangerous roof when he knew that he should not do so. A cross-notice of appeal by the Coal Board has been served in this case.

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[2] [1949] 1 K.B. 704, 708, 709, 710; 65 T.L.R. 430; [1949] 1 All E.R. 743, C.A.

On those submissions, I feel that it is necessary to state my view as to the meaning of section 48 and then to consider its application to the facts of this case. There has been some difference of judicial opinion in regard to this matter. In *Peacock* v. *Dorman Long (Steel) Ltd.*[3] Edmund Davies J. referred to the decision of Thesiger J. in the present case, and said that if he interpreted the judgment in a certain way, while he respected the judgment, he did not regard himself as being bound by it and did not follow it. He said: "I regard section 48 "as an attempt to improve the old section 49. Under section 49 "there is no doubt at all that the manager would be liable under "the circumstances I have postulated. I cannot think that "section 48 has cut down the protection of a workman, or reduced "the liability of the National Coal Board."

On the other hand, in *Winkler* v. *National Coal Board*,[4] Winn J. referred to a decision at Nottingham Quarter Sessions, *Wright* v. *Jenkins*.[5] He said: "I, myself, think that the construction "of the section which was given [in *Wright* v. *Jenkins*[5]] is in law "correct. I do not regard that section as imposing an absolute "duty."

In *Wright* v. *Jenkins*[6] in the judgment of the chairman of quarter sessions, the following appears: "In our view, the duty "imposed on a manager by this section is to take such steps as a

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[3] Unreported, June 13, 1960, York Assizes.

[4] Unreported, May 4, 1960, at Leeds Assizes.

[5] (1958) 43 Cr.App.R. 17.

[6] Ibid. 19.

"competent manager, in the light of his own experience and in "the light of generally accepted mining practice, would have "taken."

Mr. Veale has largely based one of his submissions upon that wording. I am bound to say that I feel uneasy about such an approach to the section. That approach seems to me to introduce words which are not to be found in the Act, and to suggest a measure of duty no higher than would exist without any statutory provision.

If a section begins with the words "It shall be the duty" it seems to me that an absolute duty is being imposed, and the words that follow must then be looked at to see the nature and extent of the duty which is imposed. Section 48 (1) begins with the words "It shall be the duty." Those words are imperative. They impose a definite obligation. What is the duty? It is a duty in relation to "every road and working place in the mine." "It is a duty to take . . . steps." A further duty is imposed by section 48 (2). Under subsection (1) what are the "steps?" They are "steps by way of controlling movement of the strata "in the mine and supporting the roof and sides of the road or "working place." What is the nature and quality of those steps? The steps are such "as may be necessary for keeping the "road or working place secure." What do the words " as may "be" mean? They point to the fact that the imposed duty is a continuing one, so that the manager must ask himself: "Are any "steps necessary for keeping the road or working place secure?" If, in litigation, a question arises whether a manager either failed to consider, or wrongly answered any such question, then it will be for the court to decide whether, at the relevant date, there were steps which it was necessary for the manager to take for keeping the road or working place secure, and which he failed to take. I read the words "Take such steps as may be necessary for "keeping the road or working place secure" as meaning, "Take "such steps as are necessary in order to keep the road or working "place secure." It is to be observed that the steps are the necessary ones; they are not limited to the steps which some particular manager, acting honestly, may have thought to be necessary. The steps are those which are necessary for keeping the road or working place secure. For a road or place to be kept secure, it must, if necessary, be made secure. If for any reason, it ceases to be secure, it must again be made secure.

In regard to the meaning of the word "secure" authoritative guidance is afforded in the speeches in *Gough* v. *National Coal*

Board.[7] That was a case under the Act of 1911. Lord Reid said[8]: "In my judgment, the respondents' argument involves "an erroneous assumption as to the meaning of the word "'secure' in this context. The purpose of this part of the Act "is to prevent accidents, and, to my mind, 'secure' here means "in such a state that there will be no danger from accidental "falls. The word cannot mean in such a state that the side or "roof will stand up against deliberate attack, for no part of a "mine can be secure in that sense. I can see nothing incon-"sistent in saying that a side or roof shall be made secure against "accidental falls at a time when steps are being taken to bring it "down deliberately."

Lord Tucker[9] in his speech said: "In *Marshall* v. *Gotham* "*Co. Ltd.*[10] I had occasion to refer to the word 'secure' in a "regulation indentical with section 49 and said: 'I agree that "'the word "secure" does not involve security from the effects "'of earthquake or an atom bomb, but I think it must include "'security from all the known geological hazards inherent in "'mining operations.' I do not desire to qualify in any way "what I said in that case but would only observe that deliberate "assault on the mine face was not within my contemplation as "a geological hazard." Lord Denning said[11]: "But save for "such exceptions the obligation to render the face secure is a "continuing obligation to make it secure, that is, free from danger "of unintended falls."

The relevant time in reference to which the inquiry would relate, would be in the first place the period prior to the time when some insecurity of roof or working place occurred, or became manifest and in the second place, the period after such time. Within such latter period, there would be the obligation to replace insecurity by security. In ordinary circumstances, if there were an unintended fall of a roof, the inference would be clear that the necessary steps to keep the roof secure had not been taken; it would not avail a manager to say: "I never "thought that this would happen" or "I did not realise that any "steps were necessary." The inquiry under section 48 would be an inquiry whether there were steps that it had been necessary for him to take in order to keep the roof secure. If the fall had only taken place because some evil-disposed person had pulled away a prop which supported a girder, then in the absence of some special circumstances, such as any which pointed to the likelihood of such an event and called for special measures, it would not seem that the manager had failed to take any necessary steps. So far as human activities or operations are concerned, I would not think that it would be necessary for a manager to provide against the consequence of human conduct which, in the ordinary course of events, was unlikely and not to be expected. But if some fall resulted not from human intervention, but because of lack of control of the movement of strata or lack of support of a road or working place, then the inquiry would be whether there had been a failure to take such steps as had been required, or had been necessary, to bring it about that the road or working place was secure. The inquiry would not be whether the manager had been negligent. It would be whether steps to control or support had been necessary to bring it about that the roof or working place was secure. The experience or the competence or the perceptiveness of any particular manager would not come into question or be relevant. The steps which are necessary in order to keep a road or working place secure must be taken. Doubtless, in dealing with technical matters such as the methods of supporting roof and sides, the assistance of expert testimony will be needed, but the expert evidence cannot, even by reference to currently adopted mining practice, diminish the measure of the obligation imposed by the statute, which is to take the steps that are requisite so that, or to bring it about that, roads and working places are secure. A step which is necessary is nonetheless necessary, even though it was not known to be necessary and even though someone was not negligent in not knowing that it was necessary. If, however, necessary steps have not been taken, then there may be the defence that is indicated by section 157, if it could be proved that it was impracticable to avoid or prevent contravention. "Impracticable" is a familiar word which can be understood by all and which needs neither synonym nor paraphrase. A consideration of section 157 tends to confirm in my mind the view that I have expressed as to the meaning of section 48. That which is necessary may be something more than that which is practicable; but if "the necessary steps" in section 48 are defined as those steps which "a competent mining engineer in "the light of his own experience and in the light of generally

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[7] [1959] A.C. 698; [1959] 2 W.L.R. 658; [1959] 2 All E.R. 164, H.L.

[8] [1959] A.C. 698, 711.

[9] Ibid. 713.

[10] [1954] A.C. 360, 374–375; [1954] 2 W.L.R. 812; [1954] 1 All E.R. 937, H.L.

[11] [1959] A.C. 698, 718.

"accepted mining practice" would take, then surely such necessary steps could only be those which are practicable.

Having given my view as to the construction of section 48, I cannot agree with Mr. Waller that the words have the meaning that the manager must "ensure" that a road or working place is kept secure. That is not what is said, and I feel that it is so important to keep to the words of the section and not to introduce others. If Parliament had wished to use the word "ensure" in this section, it could have done so. The word is to be found in other sections in the Act. What is said in section 48 is that the manager must take such steps as are necessary for keeping the road secure.

Is there then any evidence in this case that down to the moment when the tub displaced the support, the manager had failed to take such steps? I can see none. The road in question was properly supported. Then came the mishap to the support. But that did not involve that the manager had failed to take steps to keep the road secure. He had not failed. The road had been secure. When, owing to the accidental assault upon security, a state of insecurity was created, then the occasion arose for a new and further fulfilment of the continuing duty of the manager to take steps. But there is no evidence that he failed at that stage. The situation was in fact being dealt with by the overman with the utmost dispatch and probably before there would even be time for the manager to be made aware of the situation. In my judgment the evidence positively negatives any suggestion of failure on the part of the manager down to the moment of the mishap, and there is no evidence of any failure during the few minutes that intervened between that moment and the moment when the plaintiff was injured. I consider therefore that the claim rightly failed and I would dismiss the appeal.

Holroyd Pearce L.J. I agree. But I regret to find myself not wholly in accord with the views expressed by my Lord with regard to the meaning of the words "such steps as may be "necessary" in section 48 of the Mines and Quarries Act, 1954. I venture to think that they have a somewhat different connotation.

We have been helped by very full and clear arguments on both sides. Mr. Waller admitted for the purposes of his main argument that before the tub damaged the concrete prop and caused the girder to fall there was no contravention of section 48. The manager had taken such steps as might be "necessary for keeping the road or working place secure" and it was in fact secure. But he argues that the moment after the damage had been caused by the tub and the girder had fallen there was a contravention of section 48. For there was then a state of insecurity and therefore the defendants from that moment failed to keep the road secure. He frankly admits that this argument is dependent on reading the words in section 48 (1) "to take such steps . . . as may be necessary for keeping the "road or working place secure" as if they were "to ensure that "the road or working place shall be kept secure." Thus, he argues, there is an absolute duty to keep the road or working place secure (subject always to the escape provided by section 157 on proof of impracticability) and a state of insecurity, however caused, constitutes a contravention of section 48.

He seeks to justify this drastic paraphrase of section 48 by referring to previous enactments. The Coal Mines Regulations Act, 1872, had provided (by section 51) that "The following "general rules shall be observed so far as is reasonably practicable: . . . (16) The roof and sides of every travelling road ". . . shall be made secure." That provision was re-enacted in the Coal Mines Act, 1887.

The Coal Mines Act, 1911, provided (by section 49) that "the "roof and sides of every travelling road and working place shall "be made secure." The escape clause "if it is shown that it "was not reasonably practicable to avoid or prevent the breach" was then for the first time put into a separate section (s. 102 (8)). In *Edwards* v. *National Coal Board* [12] it was not doubted that any insecurity of roof or sides constituted a breach of an absolute duty under section 49 of the Coal Mines Act, 1911. Against that background of eighty years of absolute liability it is incredible, argues Mr. Waller, that the legislature intended by the Mines and Quarries Act, 1954, s. 48, to destroy or to erode the right that miners had so long possessed and to reduce the absolute liability of owners to what would in most cases be merely the ordinary common law liability, laid on their manager, namely, a duty to "take such steps as may be necessary to keep the road "or working place secure."

Yet that is what the Act apparently says. It is difficult to argue that the words of the section mean "shall ensure that "the road or working place shall be kept secure" when in fact the words are "shall take such steps as may be necessary to "keep the road or working place secure." And the argument is made still more difficult by the fact that in section 74 (1) and section 82 (2) of the same Act the words "it shall be the "duty of the manager of every mine to ensure" are actually used in connection with other duties. If that was also intended in section 48 why was it not also thus expressed?

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[12] [1949] 1 K.B. 704.

In other sections (sections 51 (3), 55 (5), 56 (2), 61, 66 (7)) the words "shall secure that" are used presumably with a meaning similar to that of the words "shall ensure that." Moreover, in section 55 both the expressions "shall take such steps "as are necessary for securing" and "shall secure that" are used with an apparent intention that they shall mean different things. Section 55 (1) provides: "It shall be the duty of the "manager of every mine to take such steps as are necessary for "securing that there is constantly produced in all parts of the "mine below ground ventilation adequate for," and so forth. And section 55 (5) provides that when the ventilation is interrupted "it shall be the duty of the manager of the mine to secure "that, until the ventilation is restored, access to that part of the "mine is so restricted as to prevent from entering it any person "not authorised to do so . . ." If the "taking of such steps as "are necessary" is tantamount to "securing," then the difference in wording is odd, and, moreover, it would then appear that the interruption of ventilation must constitute a contravention; and it is surprising, if so, that the section does not mention that it is a contravention when dealing with the duty that arises owing to such interruption.

Further, in the Act of 1911 (section 38) a provision that shafts "shall be made secure" is repeated in the same terms (so far as material to this argument) in the Act of 1954, section 30 (1) showing that where the same liability is intended the same words are used, as one would expect.

Undoubtedly there is force in Mr. Waller's careful argument. He sought to support it by other smaller points which really add little or nothing to the obvious force of the main argument. But in my view that argument cannot survive the plain language of the Act of 1954 and the inference to be drawn from those other sections to which I have referred.

I do not accept the argument that you must consider section 49 of the Act of 1911 and section 48 of the Act of 1954 divorced from the escape clause. In considering the language to be used and the burdens to be imposed by those sections respectively, Parliament must have taken into account the respective escape clauses. To say that under the Act of 1911 or any previous statute the owners were insurers or the duty was absolute is apt to be misleading. In each case liability was subject to the practicability of avoiding the contravention. It was, of course, very important to a plaintiff that there was a presumption of absolute liability which enabled him to succeed unless the owners by their evidence showed that the escape clause applied. But one cannot properly say that the owner of a house is under an "absolute" liability for anything falling from his window onto a passer-by merely because he is liable under the doctrine of res ipsa loquitur unless he can show that he was not negligent, or (to borrow the words of the Act of 1911) that it was not reasonably practicable to stop the object from falling out of the window. If one compares section 49 of the Act of 1911 as modified by the escape clause with section 48 of the Act of 1954 as modified by the escape clause, the contrast is not nearly so dramatic as it appears to be when one compares them without any consideration of the respective escape clauses.

The Act of 1954 has made various alterations. The general provision under section 49 of the Act of 1911 that "the roof and "sides of every travelling road and working place shall be made "secure" becomes a personal liability on the manager under section 48 of the Act of 1954. Instead of being an abstract general liability it is transformed into the manager's personal duty to take such steps as are necessary. It is by taking steps that a person carries out a personal duty. Those steps are defined, namely, "such steps by way of controlling movement of the "strata in the mine" (a matter not formerly mentioned in the previous Act) "and supporting the roof and sides of the road or "working place." Further, he has by section 48 (2) a duty "to "take such steps as may be necessary for securing that he is at "all material times in possession of all information relevant for "determining the nature and extent of any steps which it is "requisite for him to take in order to discharge efficiently the "duty imposed on him by the foregoing subsection."

Thus section 48 in substance deals with what might be described as long-term planning duties. Section 49 of the Act of 1954 deals, as did section 50 of the Act of 1911, with the regular day-to-day systematic support for the roof and sides in accordance with the regulations and also with rules to be made by the manager.

In *Wright* v. *Jenkins*[13] Mr. Fitzwalter Butler, the chairman of the Nottinghamshire Quarter Sessions, in dealing with the manager's liability under section 48 of the Act of 1954, said[14]: "First of all, section 48 uses different language from that of the "corresponding sections in earlier Acts, and we think that has been "done for a purpose. If the duty was already absolute, as it "undoubtedly was, it obviously cannot be made higher; if the "duty was to remain the same, there would be no necessity for "using different words; but if it were desired to diminish the "duty, then in our view, the use of different language would be "appropriate. Secondly, there is introduced for the first time "into this section a new element, namely, control of movement "of strata. That is an element into which unknown factors must, "to some degree, enter; and that consideration also, we think, "must be borne in mind. Thirdly, . . . there are other sections in "this Act where an absolute duty is obviously created and where "language of a different kind is used." Those cogent observations were approved obiter by Winn J. in *Winkler* v. *National Coal Board*.[15] I find myself with all respect to my Lord unable to share his view that those observations are in any way erroneous.

These alterations embodied in the wording of section 48 of the Act of 1954 have not, however, changed the burden of proof. If there is insecurity, the burden lies on the manager and the plaintiff is still entitled to judgment on proof of an accident due to insecurity of the roof if nothing further is proved. For the insecurity is prima facie evidence that the necessary steps have not been taken. But the mere fact that insecurity results does not make the manager liable if he proves that he did take "such "steps as may be necessary." His duty to take those steps is absolute but he is not made to insure their success.

If "such steps as may be necessary" meant "steps which, "after the event, are shown in retrospect to have been neces"sary," he would be put (subject to the escape clause) in the position of an insurer. For in nearly all cases of (for instance) collapse of a roof it is possible by subsequent investigation to find steps which, had the unknown been known, could have successfully prevented the collapse. But that meaning is not, as I think, the normal and natural meaning of the words "shall

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[13] 43 Cr.App.R. 17.

[14] Ibid. 18.

[15] Unreported, May 4, 1960, at Leeds Assizes.

"take such steps as may be necessary." If that meaning was intended, it could easily have been so expressed. Nor did Mr. Waller argue in favour of such an interpretation. Such an interpretation would, I think, be a reversion to the artificial abstract conception of absolute liability which has been discarded in the Act of 1954 in favour of the real concept of an efficient person taking steps which are necessary in the light of knowledge which it is possible for him to possess. Section 48 (2) clearly contemplates that the manager can "efficiently discharge the duty imposed on "him" by determining in the light of "all information relevant" (which cannot, I think, include information which it is physically impossible to possess) "the nature and extent of any steps which "it is requisite for him to take." Whether steps are necessary must, therefore, in my opinion, be decided in the light of all the facts which were known or ought to have been known at the time when the decision to take those steps fell to be made and when it was still possible for those steps to be taken. And an immediate notional failure to take steps cannot be imputed to the manager at the moment of an unforeseeable occurrence without giving him any space of time in which such steps could physically be carried out to remedy the occurrence.

The escape clause under the Act of 1954 is somewhat more restricted than that under the Act of 1911. It is slightly more difficult to show that avoidance of the breach was "impractic-"able." The difference of meaning between the two expressions is hard to define; and further definitions of words that in themselves express a shade of meaning are not helpful. But the difference, though hard to define, exists, and in a border-line case it might produce a difference in the result. The word "reason-"ably" has a slight tendency to modify the word "practicable." I respectfully agree with the words of Lord Reid in *Marshall* v. *Gotham Co. Ltd.*[16]: "But, in my judgment, there may well be "precautions which it is 'practicable' but not 'reasonably "'practicable' to take, . . ."

In the result I do not find the difference between section 49 of the Act of 1911 and section 48 of the Act of 1954 with their respective escape clauses very startling. The abstract absolute duty has become a concrete practical duty, personal to the manager and he cannot avoid it. It is not so stringent as was the impersonal duty, but the escape clause has become a little stricter. The total difference between the old and the new sections is certainly not so great or so incredible as to indicate that it cannot have been intended. It cannot justify us in giving to the words of the statute a meaning other than their plain ordinary meaning.

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[16] [1954] A.C. 360, 373.

As to the particular facts of this case and the application of section 48 to them, I agree with what my Lord has said. The manager did not fail to take such steps as were necessary and there has been no breach of section 48. In my judgment, the judge came to the right conclusion and the appeal should be dismissed.

PILCHER J. I agree that this appeal should be dismissed. Section 48 of the Mines and Quarries Act, 1954, imposes for the first time a personal duty upon the manager of every mine in the words of the section. The words relating to the control and movement of the strata in the mine are new ones which do not appear in the earlier Act. Clearly under the subsection the manager has in the first place personally to consider, and no doubt reconsider from time to time, what general system of support is appropriate to each particular road or working place in the mine, and no doubt to see that the system or systems approved by him are installed, maintained and altered from time to time if he considers this necessary, the actual work of installation, maintenance and alteration being done by his subordinates. The prop which was displaced by the tub which ran off the line in the present case with the resultant displacement of the girder which caused the first fall of stone was a unit in a form of "systematic "support" for the roof, the obligations in respect of which are set out in section 49 of the Act of 1954, and it would seem that this systematic support was properly installed and maintained under rules made by the manager under subsection (5) of section 49. Subsection (2) of section 48 provides that: "It shall be the "duty of the manager of every mine to take such steps as may "be necessary for securing that he is at all material times in "possession of all information relevant for determining the nature "and extent of any steps which it is requisite for him to take in "order to discharge efficiently the duty imposed on him by the "foregoing subsection," that is to say subsection (1).

Mr. Waller's main submission was that the words of subsection (1) of section 48 requiring the manager to "take with "regard to every road"—I leave out the words which are immaterial—"such steps by way of supporting the roof as may "be necessary for keeping the road secure" imposed upon the manager an absolute obligation to ensure that the roof was at all times kept secure, subject of course to any defence available to the defendants under the escape clause in section 157 of the Act. He submitted in effect that from the time when the prop was knocked down and the supporting girder collapsed, which seems to have been only a few minutes or so before the second fall of stone which injured the plaintiff, the roof was not secure and that the mine manager was in consequence in breach of his absolute duty to keep the roof secure, and that he remained in breach of his duty until the plaintiff's accident happened and that the defendants cannot therefore escape liability for an accident due to this breach.

There was no evidence that the general system of support in this road was not perfectly proper or that the particular prop and girder which fell were insecure or improperly positioned. Mr. Waller conceded, I think, that until the prop was knocked down the roof at the material place was in fact secure, and whether he intended or not to make that full concession it seems to me that it would be impossible for him to argue that the prop in question was not in fact secure prior to the derailment of the tub. It is equally clear that after the prop was knocked down the roof was and remained insecure until after the accident. On the facts found by the judge, which are accepted for the purposes of this appeal, it was not suggested that the defendants or their servants had been guilty of any negligence between the time when the prop fell and the time when the plaintiff's accident occurred.

Mr. Waller's main submission necessarily involved that his appeal must fail unless he could satisfy this court that section 48 (1) imposed an absolute obligation upon the mine manager by himself and his subordinates to keep the roof secure with a consequent responsibility upon the defendants to pay damages for any injury sustained by their servants due to a fall of roof whilst the roof was in a state of insecurity, as it admittedly was when the plaintiff's accident occurred.

Subsection (1) of section 48 imposes for the first time upon the mine manager personally the duty of taking such steps by way of controlling movement of the strata in the mine and supporting the roof and sides of the road as may be necessary for keeping the road secure, and, as I have indicated, subsection (2) of the same section requires the manager to take steps to see that he is at all times equipped with the necessary information to enable him to discharge efficiently, and I stress the word "efficiently," the duty imposed upon him under subsection (1).

There is no doubt, therefore, that the duties and responsibilities imposed by the section on the mine manager are heavy ones. Section 48 is the first of the fasciculus of sections in the Act of 1954 which deal with support, and in particular with the support of the roof and sides of roads and working places in the mine. It is clear upon the evidence and the facts found that the particular prop which was knocked down was perfectly properly set up and was a unit in the systematic support which obtained in the area. It was not suggested that it would ever have collapsed as it did if it had not been the object of an extraneous "attack" by the tub in question. This attack caused it and the girder to collapse and thus caused the roof to become insecure. Thereafter it is common ground that no amount of care or diligence on the part of the mine manager could have got the roof into a condition of security before the plaintiff's accident occurred.

There was no evidence as to why the tub ran off the line into the prop except that it had been damaged in an earlier derailment. It may have been derailed for the second time because of this damage or possibly because there was some debris or rubbish on the line. All this is a matter of speculation and has nothing to do with the support of the road as such. Section 36 of the Act deals with the duty of the manager not to permit vehicles to come into contact with supports as this tub did, and it may well be that a proper examination of the tub in question would have shown that it was liable to run off the line and come into contact with supports. If the tub ran off the line because of debris or rubbish left on the line the defendants would have been in breach of their common law duty and possibly also of some statutory duty to keep the line free from obstruction. It seems proper to have these matters in mind although the plaintiff's action here was brought under section 48 and it is with the proper construction of this section that we are concerned. It is perhaps trite to observe that the section in question should in the first place be construed, if possible, in accordance with the natural meaning of the words used divorced from a consideration of the words used in comparable sections of earlier Acts dealing with the question of support. I confess that the words of the section which require the manager to take such steps in the two matters as may be necessary for keeping the road secure do not appeal to me as being in themselves apt to impose upon the manager an absolute duty by such steps to ensure security. The requirement in subsection (2) that the manager shall equip himself with

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the necessary information to discharge his duties under subsection (1) efficiently also introduces to my mind the concept of a high personal duty which is inconsistent with an absolute obligation to ensure security.

In my opinion the steps which the manager was obliged to take under the section were such steps as appeared to him to be necessary for keeping the roof and sides of the road secure in the light of the knowledge which he had or ought to have had when he took the steps in question. If it turns out that the manager failed to take a necessary step or took a wrong step in the light of what he knew or ought to have known before insecurity arose he will be in breach of the section, but I find myself unable to assent to the view that "the necessary steps" which he is obliged to take under the section as a matter of construction include steps the necessity for which could only be ascertained after insecurity arose.

I have naturally felt myself in some considerable difficulty in arriving at a conclusion as to the proper construction of this section by reason of the fact that Lord Morris and Pearce L.J. have taken differing views as to its construction, although the result of the case will not be affected by that. But I have had the advantage of reading the judgment of Pearce L.J. which has just been delivered. I respectfully agree with every word of it and I should like to be permitted to adopt it without repeating his careful analysis of the various material sections of the Acts of 1911 and 1954 which impose absolute liability in regard to support and other matters upon the mineowner and also those sections of the Act of 1954 which only require the mine manager to "take steps." I also agree with the conclusion at which Pearce L.J. arrives as to the proper construction of section 48 (1). It is, I think, quite clear that when Parliament intends to impose an absolute liability to ensure security apt words are used to do so. The fact that different words are used in section 48 of the Act of 1954 in regard to support from the clear words used in section 49 of the Act of 1911, where the mineowner's obligation in this respect was absolute, leads me to suppose that some change in the obligation was intended. An absolute obligation cannot be rendered more onerous, and I therefore conclude that if a change was intended it must have been in the direction of a relaxation of the concept of absolute liability. This conclusion, taken in conjunction with what I think is the ordinary and natural meaning of the words, leads me, in the difficult situation in which I find myself, to agree with Pearce L.J. and regretfully to have to disagree with the construction put upon the section by Lord Morris. In the result, therefore, in the view which I take, the mine manager was never in breach of this section from the time when the roof was rendered insecure until the time of the occurrence of the second fall which injured the plaintiff. The defendants, therefore, do not need to invoke the provisions of section 157, and had they needed to do so they would on the facts found by the judge, and for the reasons stated by my Lord, have been entitled successfully to do so.

Appeal dismissed with costs. Leave to appeal to the House of Lords granted.

Solicitors: *Sharpe, Pritchard & Co. for Watson, Burton, Booth & Robinson, Newcastle-upon-Tyne; W. M. Burnside, Solicitor to the National Coal Board, Newcastle-upon-Tyne.*

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OLIVER AND OTHERS *v.* ASHMAN AND ANOTHER.

1960
Nov. 2, 3.

Lord Parker C.J.

[1959 O. No. 687.]

Damages—Personal injuries—Loss of amenities—Life shortened—Very young child—Permanent injury to brain—No knowledge of amenities lost—Probability of permanent residence in State institution—Whether entitled to compensation for loss of amenities of life—Whether probability that award never expended on behalf of child relevant—Loss of expectation of life.

A boy, aged 20 months, received a serious brain injury in a motor accident due to the admitted negligence of the defendants. As a result of the injury the boy became a low-grade mental defective; it was unlikely that he would ever be able to speak or that he could be educated to anything but a very limited extent. He required constant care and control, constant medical supervision and such re-education as was possible. At some time he would have to leave home and go to an institution or school, and it was his parents' wish that, at any rate at first, he should go to a private school or institution, but there was evidence that he would receive better care and medical attention in a State institution to which, sooner or later, he would have to go, and where, subject to visits home, he would have to remain for the rest of his life. As a result of his injury the boy's expectation of life was reduced.

In assessing the damages to which the boy was entitled:—

Held, that the boy was entitled to compensation for future loss of earnings, and also for the loss of the enjoyment and amenities of life, whether or not he knew what he had lost, although the amount under the latter head must be less than it would be in the case of a person who had enjoyed the amenities of life and knew that he had lost them; that whether or not the boy would ever be able to use the money awarded him as compensation was irrelevant, so that, although the probability was that a large part of the award might never be expended on his behalf, he should receive such a sum as would enable him, at any rate for a time, to live in a private institution; and that, in assessing his damages, the fact that his expectation of life had been reduced should be ignored.

Pope v. *D. Murphy & Son Ltd.* [1961] 1 Q.B. 222; [1960] 2 W.L.R. 861; [1960] 2 All E.R. 873 applied.

Benham v. *Gambling* [1941] A.C. 157; 57 T.L.R. 177; [1941] 1 All E.R. 7, H.L. distinguished.

Action.

On February 24, 1958, at Welwyn Garden City, the plaintiffs, William Oliver, his wife, Anthea Oliver, and their infant son Robin, then aged 20 months, were injured in a motor accident when, owing to the admitted negligence of the defendants, Allan George Ashman and Samuel Seaton, the car in which they were travelling came into collision with another car and overturned. The adult plaintiffs were only slightly injured but the boy, Robin, received a very serious head injury causing permanent damage to his brain. This report is concerned solely with the award of damages in respect of that injury.

After the accident the condition of the boy deteriorated. He gradually became unable to speak and it was unlikely that he would ever be able to regain the power of speech. He was incapable of being educated, except to a very limited degree. He required and would require constant care and control and medical supervision, and at some time in the future would have to leave home and live in an institution. His parents preferred that, when he did leave home, he should go to some private school or institution, but there was expert evidence to the effect that he would receive better care and attention in a National Health Service institution, and that, sooner or later, he would have to go to such an institution where, subject to visits home, he would have to remain for the rest of his life. He had no sustained feeling or recollection, and if he felt pain, it was purely momentarily: there was some evidence that he was beginning to realise that he was different from others, but any such thoughts or feelings were of a transient nature. His expectation of life was reduced.

The facts relating to the condition of the boy are more fully set out in the judgment.

N. R. Fox-Andrews Q.C. and *J. D. Stocker* for the plaintiffs.

E. Ryder Richardson Q.C. and *E. W. Eveleigh* for the defendants. It is not sought to deny the distressing character or the severity of the injuries received by this child, but, since it is almost impossible to separate the various elements making up the damages to which he is entitled, the proper approach should be to ask: What is fair and reasonable compensation for the whole of the loss which he has suffered, having regard to all the features of the case? Although some part of the sum awarded must be attributed to loss of the major opportunities and amenities of life, on the principles in *Benham* v. *Gambling*,[1] that should not be a large sum.

[Lord Parker C.J. How relevant is the fact that this child will never know what he has lost?]

That is a factor to be considered. His case cannot be compared with that of an adult, for example, a married man in the prime of life who has known the pleasures of life, of work and supporting his family, who, through some accident, has become a paraplegic and who has to spend the rest of his life in a wheel chair and support himself out of his damages. Obviously a large part of the damages which such a man would recover would be attributable to the loss of the pleasures of life which he had known. Cases such as that must be distinguished, for this is a case of a mind which has never known anything other than a few letters of the alphabet and the love of his parents.

[Lord Parker C.J. Is the right view that this child has been deprived of the opportunity of enjoying life together with such extra amenities as his earnings would have enabled him to obtain?]

Subject to the application of *Benham* v. *Gambling*.[1] What has to be left out of account are those aspects which, in the case of an adult, or even of an older child, would be attributable to loss of amenities of life.

Another factor to be taken into account is that for the rest of his life this boy will remain in some institution, most probably at the expense of the State. If he were awarded a very large sum, the chances are that it would not be needed for his support and, since he would never be able to use it, it would merely go to benefit his next-of-kin on his death.

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[1] [1941] A.C. 157; 57 T.L.R. 177; [1941] 1 All E.R. 7, H.L.

It is agreed that the damages should include such a sum as would enable him, should his parents wish to do so as his agents, to employ a nurse until he goes into an institution; that weight should be given to his parents' wish that he be educated in a private school, although it is unlikely that he could remain there for very long; and that extra help will be required during his visits home. In regard to loss of opportunity of earning, it must be borne in mind that he will be kept at the expense of the State and will not have to support a wife and family. The child is also entitled to damages for pain and suffering, if justified by the evidence: if, however, he has no recollection, it might be that there is very little appreciable pain, because the difference between pain and reaction lies in memory, so that any award under this head should be notional.

Fox-Andrews Q.C. in reply. Damages are compensation to a plaintiff for what he has lost, not for what he knows he has lost. The right approach is that a plaintiff is entitled to compensation for the actual loss and injury suffered. This child is entitled to be compensated because he has been made into a mental defective and will remain one for the rest of his life. He has had taken from him the opportunity of going into the world and earning his living, perhaps of marriage, and of enjoying the amenities of life, and his compensation under those heads should not be reduced because he does not know of his loss, although it is conceded that if he did know what he had lost, the damages should be higher. He has been deprived of the chance of enjoying his life and the amenities which his earning would have produced for him had he been able to lead a normal life. The principles in *Benham* v. *Gambling*[2] do not apply to this case. The court is asked to include, as one of the main items of the damages, compensation for the deprivation throughout the whole of his life of the opportunity of earning a living, ignoring the fact that his expectation of life has been reduced: see the approach of Streatfeild J. in *Pope* v. *D. Murphy & Co. Ltd.*,[3] differing from that of Slade J. in *Harris* v. *Brights Asphalt Contractors Ltd.*[4]

It is irrelevant that the child might go into some State institution. His parents might well be right in their view that it is in his best interests that he should be educated at a private school; the defendants are not entitled to save themselves money at the taxpayers' expense by saying that it would be best for him to go into a State institution, but it is for them to satisfy the court that that would be the best course for him. Nor is it relevant that, if the child does go into a State institution, the damages might not be needed, and some part of the damages might not be expended on his behalf but might go to benefit his next-of-kin. The question is what has this boy lost, not to what use will the damages be put.

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[2] [1941] A.C. 157.

[3] [1961] 1 Q.B. 222; [1960] 2 W.L.R. 861; [1960] 2 All E.R. 873.

[4] [1953] 1 Q.B. 617; [1953] 1 W.L.R. 341; [1953] 1 All E.R. 395.

LORD PARKER C.J. On February 24, 1958, as a result of the admitted negligence of the two defendants, a car driven by the plaintiff, William Oliver, was involved in a collision: he and his passengers—his wife and small child, Robin Oliver—each suffered injuries, and the sole issue in this action is the amount of damages.

[His Lordship considered the injuries sustained by the father and mother and, having assessed their damages, continued:] Unhappily, the child Robin suffered very serious injuries indeed. He was 20 months old at the time and is now four years and four months old. He was sitting on his mother's knee and in the collision was thrown forward and hit his head on the instrument panel and the door. [His Lordship referred to the hospital reports and continued:] The medical evidence is, in effect, really agreed. The medical expert for the defendants who examined him in July, 1959, said: "This child was involved in an accident "which produced head injuries of great severity with a severe "fracture from the parietal region and permanent damage to the "brain in the frontal region. This produced grave impairment "of the intelligence, the child now being imbecile with severe "traumatic epilepsy, and is not capable of talking. There will "be a definite limit to the amount of improvement this child is "capable of making in future. A little further improvement may "occur but he will remain always of gravely diminished intelli-"gence. Epilepsy may become less marked with the passage of "time, but it is impossible to be definite about this. The pre-"sence of such frequent attacks is regarded at present as shorten-"ing the expectation of life. All his life he will stand in need "of constant care and attention and prove ineducable. I recom-"mend that the child be examined in a year's time."

The medical witness for the plaintiffs agreed in substance with that report, if the term "imbecile" were altered to "mental "defective"; he also did not quite accept the fact that the boy was incapable of being educated at all, although he was forced to agree that any education would be of a very limited character.

The report of Sir Russell Brain, admittedly a great expert in these matters, was: "This boy suffered a head injury which left "him a low-grade mental defective. He is now unable to speak "and I think he will never be able to do so. For all practical "purposes he has no understanding of what people say to him. "He is in need of constant care and supervision throughout his "life, even to guarding him from common dangers. He will "never be able to earn his living. In a few years' time, he may "prove impossible to control at home, especially as there is now "a younger child and he will need to go into an institution for "mental defectives. It is impossible to give an accurate estimate "of his expectation of life, but it is certainly a good deal less "than normal." As to that, the expert for the plaintiffs agrees, save that he does not go so far as to say that the child will never be able to speak, although he agrees that it is only a hope that he might be able to do so.

The prognosis as I find it is that it is unlikely that he will be able to regain anything for practical purposes, at any rate in speech, and that so far as education is concerned it can only be of a very, very limited character. All the doctors agree that what this child needs is, first, affectionate care and control all the time; secondly, constant medical supervision, in particular for the epileptic fits; thirdly, such attempts as can be made towards re-education. There is some conflict of evidence as to how that can best be achieved. All are agreed, at any rate, that as long as it is possible to retain him in the home under the constant care of his mother, the better, but the parents, who are very sensible people, have now resigned themselves to the fact that the child will have to leave home at some time in the future. He will be getting too big to be properly controlled by his mother and, in addition, there is the difficulty of bringing him up with the younger brother, a perfectly normal child.

At the moment, the parents, very naturally, are against the idea that, when he does leave home, he should go to a State institution, a hospital for mental defectives or backward children. They think that he will get better treatment and care in some private institution and they have in mind a Rudolph Steiner school. Sir Russell Brain in particular feels that today, provided he goes to a first-class State institution, the chances are that the child will have better care and better medical attention and education than in a private establishment. He agrees, naturally, that some regard must be had to the parents' wishes and quite clearly, if the Rudolph Steiner schools will take the child—and it is too early to tell that yet—or some other private institution, it would no doubt be right to try that first. But Sir Russell Brain is clearly of the view that sooner or later this child will have to go to a State institution and, what is more, that there he will remain for the rest of his natural life, subject to visits home.

The question to answer in these circumstances is what amount of damages this child is entitled to. Certain things are clear. He must be compensated in money for such expenditure as will have to be incurred on his behalf by having some extra help in the home so long as he remains at home. On that basis it looks as if his parents on his behalf will have to employ a nanny for some moderate number of years, say three or four years. Also it looks as if they will have to expend, and rightly expend, money in sending him to some private institution in the first instance, if any private institution will take him. And when he goes to a State institution, they may well require extra help in the home during the periods when he comes out of the State institution and comes home. In respect of these matters, the child is clearly entitled to compensation.

So far as damages for pain and suffering are concerned, any award must be small and possibly nil because the general view is that this child really does not feel pain and suffering. If he does, it is purely momentary. He has no sustained feeling or recollection and, indeed, if I understand it right, Mr. Fox-Andrews on his behalf does not claim compensation in this case under the heading of pain and suffering.

The more difficult question is what amount the child is entitled to receive as a result of what he has lost through his injuries. He has lost the opportunity, to use quite general terms, of living, marrying, having children and enjoying life. He has also lost the opportunity of earning a living and obtaining such amenities as his earnings could buy. As against this, he will be kept, on one view, for the rest of his natural life at the expense of the State. As to the loss of opportunity to enjoy life, this is not the case of a person who has known the enjoyment of life and has been deprived of it. It is true that there is some evidence from the father that the child is beginning to realise that he is different from others. The father thinks, and it is all rather problematical, that the presence of the younger child makes Robin frustrated, that he realises in some way that his young brother is going ahead of him, but I am quite satisfied that if he does have these thoughts and feelings they are again of a fleeting, momentary nature and that he has no sustained feeling.

At the same time, I am quite unable to accept the contention put forward by Mr. Ryder Richardson that this is purely what I may call a *Benham* v. *Gambling*[1] case. The child is entitled to something for what he has lost, whether he knows he has lost it or not, albeit that the amount may well be less than in the case of a person who has enjoyed life and amenities and knows that he has lost them. The trouble, however, is to put that into money. There are so many imponderables, especially in the case of such a young child. So far as loss of earnings are concerned, the considerations involved again cannot easily be put into pounds, shillings and pence. Here again, there are imponderables. What education would the parents have been able to give the child? If one or other of them died, would the education have been interrupted? If not, how far would the child have succeeded? What trade or profession would he take up and what would he have earned? There is no conceivable clue to that. The only guide, if it be any guide at all—and I do not think that it is—is that his father is working in an executive capacity making, I am told, £1,250 a year. In addition, there are questions of taxation and other matters, but whatever view one takes as to eventual earnings, the figure must in the case of such a young child be heavily discounted.

Doing the best I can in all the circumstances, I would award to this child a sum of £11,000. In awarding such a sum, I am conscious of the fact that it may well be—indeed, I think the overwhelming probabilities are—that a large part of this money will never be expended by or on behalf of the infant plaintiff. It will, I think, to a large extent remain untouched and left to his next-of-kin, or it may well be that the parents, if a receiver were appointed, might obtain some use of the money, but I think these considerations are entirely irrelevant. It seems to me entirely irrelevant to the damages whether the plaintiff will ever be able to use the money. Of course, on the view that it may be that he can and will live, at any rate for a time, in a private institution, then that sum will enable him to do so.

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[1] [1941] A.C. 157; 57 T.L.R. 177; [1941] 1 All E.R. 7, H.L.

I would also like to say that in awarding this sum I have followed the decision of Streatfeild J. in *Pope* v. *D. Murphy & Son Ltd.*,[2] and in making this assessment have ignored the undoubted fact that in this case the expectation of life has been reduced. Accordingly, doing the best I can, I would give judgment in this case for Robin Oliver for £11,000.

Judgment accordingly with costs.

Solicitors: *G. Howard & Co.; L. Bingham & Co. and Joynson-Hicks & Co.*

J. F. L.

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[2] [1961] 1 Q.B. 222; [1960] 2 W.L.R. 861; [1960] 2 All E.R. 873.

CLAYTON (VALUATION OFFICER) *v.* KINGSTON-UPON-HULL CORPORATION.

C. A.

1960
Oct. 20, 21;
Nov. 10.

Lord Evershed M.R., Harman and Donovan L.JJ.

Rating—Rateable occupation—Art gallery—Hereditaments for use by the public as an art gallery—Exclusion of public from parts of hereditament—Whether any beneficial occupation.

Under an indenture of December 9, 1919, the Ferens Art Gallery at Kingston-upon-Hull was held by Kingston-upon-Hull Corporation upon a valid charitable trust to permit it to be used and enjoyed by the citizens of the City and County of Kingston-upon-Hull and the public generally as an art gallery for the exhibition of works of art in perpetuity. About two-thirds of the gallery building was used for the display of works of art, and were open daily to the public without charge, the remaining third of the building, to which the public was not admitted, was used as offices and store rooms and for purposes ancillary to the running of the gallery. The Lands Tribunal, affirming the decision of the local valuation court, held that the gallery was not rateable on the ground that there was no beneficial occupation of it, and for rating purposes the public were the occupiers:—

Held (Donovan L.J. dissenting), that under the trusts declared of the art gallery the right of the public was not comparable to the "free and unrestricted user" by the public of an open space, and that the corporation was the occupier of the gallery, which was not exempt from rating.

Hare v. *Putney Overseers* (1881) 7 Q.B.D. 223, C.A.; *Lambeth Overseers* v. *London County Council* (the *Brockwell Park* case) [1897] A.C. 625; 13 T.L.R. 527, H.L.; *Burnell* v. *Downham Market Urban*

District Council [1952] 2 Q.B. 55; [1952] 1 All E.R. 601, C.A. distinguished.

Decision of the Lands Tribunal reversed.

APPEAL from the Lands Tribunal.

This was an appeal by the valuation officer from a decision of the Lands Tribunal, affirming the decision of the local valuation court for Kingston-upon-Hull and East Riding (South), that the Ferens Art Gallery, Victoria Square, should be entered on the valuation list for Kingston-upon-Hull county as exempt.

The hereditament had been entered in the valuation list with gross value £4,700 and rateable value £3,913. The respondents, the Kingston-upon-Hull and East Riding Corporation, contended that it should be treated as exempt, because it was held on trust for public use in perpetuity so as to be irrevocably dedicated to the public and incapable by law of being beneficially occupied.

The following statement of facts is taken from the decision of the Lands Tribunal.

"The site on which the hereditament stands was conveyed to "the Mayor, Aldermen and Citizens of the City and County of "Kingston-upon-Hull by the Right Hon. Thomas Robinson "Ferens by an indenture of December 9, 1919, upon and subject "to trusts comprised in an indenture of the same date and made "between the same parties. Under the latter document the corporation are required within five years to erect upon the site "out of funds which have been given to them by Mr. Ferens a "suitable building, and clause 5 provides: 'The Corporation shall "'hold the said piece of land conveyed by and comprised in the "'principal indenture and the said building or buildings (all of "'which are hereinafter included in the expression "The Art "'"Gallery") upon trust to permit the same to be used and "'enjoyed by the Citizens of the said City and County of Kingston-upon-Hull and the public generally as an art gallery for the "'exhibition of works of art in perpetuity.'

"Owing to the conditions consequent upon the 1914–1918 "war, the buildings were not in fact erected until 1928 and a "supplemental deed was executed on March 15, 1928, which "provided for the subsequent use of the balance of the funds "partly in defraying part of the usual costs of maintenance and "partly as a purchase fund for acquiring pictures, statuary and "works of art.

"It was not disputed that the effect of these deeds was to "constitute the respondents trustees under a valid charitable trust.

"The building which has been erected contains galleries on "the ground and first floors with lifts for the conveyance of "pictures, etc. On the ground floor are two offices for the curator "and a porter's room, and on the first floor part of the balcony "gallery is used as a café and a small room is set aside for the "preparation of tea, etc., for use therein. The basement is "entirely devoted to storage of works of art, restoration of such "works, unpacking and heating and ventilating and lighting. "From all the parts other than the galleries and café the public "are excluded, but it is agreed that they are all used for purposes "which are necessary and ancillary to the running of the gallery.

"The galleries are open to the public free of charge between "10 a.m. and 6 p.m. on weekdays and 2.30 p.m. and 4.30 p.m. "on Sundays (except Christmas Day and Good Friday). There "is no public demand for earlier opening and later closing has "been found not to justify the additional expense. Organised "parties are permitted to enter after 6 p.m. by arrangement, and "facilities are provided for the public for meetings, lectures or "conducted visits in the evening by arrangement with the "director.

"The staff, which consists of a director, an assistant director, "three attendants, a boiler attendant, a joiner and a waitress, are "under the control of the director.

"There are no by-laws or regulations in force in respect of the "galleries but the attendants are orally instructed by the director "to take care of the works of art, to assist in the exhibition of the "works and to ensure due decorum on the part of the public. "Smoking is allowed only in the café, and singing, eating sand"wiches and courting are discouraged. When an attendant finds "a member of the public behaving badly he is instructed to "endeavour to persuade him to leave the gallery and if he does "not do so to call the police. Since the gallery has been opened "only one or two people under the influence of drink and one "person who was shouting have had to be threatened with "ejection."

After a consideration of the decisions in *Lambeth Overseers* v. *London County Council* (the *Brockwell Park* case)[1]; *Trustees of Sir John Soane's Museum* v. *St. Giles and St. George's Joint Vestry*[2]; *Liverpool Corporation* v. *West Derby Union*[3]; *Bowes*

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[1] [1897] A.C. 625; 13 T.L.R. 527, H.L.

[2] (1900) 83 L.T. 248.

[3] (1905) 92 L.T. 467.

Museum and Park Trustees v. *Cutts*[4]; *Erith Borough Council* v. *Draper*[5]; *Burnell* v. *Downham Market Urban District Council*[6]; *Burnell (Valuation Officer)* v. *Terrington St. Clement Parish Council*,[7] the decision of the Lands Tribunal continued:

"So far as the exclusion of the public from certain parts of "the building is concerned, 'in the *Brockwell Park* case[8] itself "'there were certain portions of the land from which the public "'were necessarily excluded—those portions occupied by a "'keeper's lodge, the bandstand and refreshment building. But "'these exclusions were the manifestations of the duty and "'exercise of management and their total area compared with "'that of the whole park was, of course, negligible' (*per* Lord "Evershed M.R. [in the *Downham Market* case[9]]). In the "present case, of course, the area is not negligible compared "to the whole, but there is no dispute that the purposes for "which they are used are necessary and ancillary to the "running of the gallery and they can therefore properly be "described as 'the manifestations of the duty and exercise "'of management.' Does therefore the fact that the area is "not negligible result in the hereditament not being occupied "by the public? As the Court of Appeal pointed out in the "*Downham Market* case,[10] the question is one of degree, but "it did refer to the importance of considering whether the "exclusion is 'properly ancillary to the management' for the "purpose for which the hereditament is dedicated, and whether "it involves 'any departure from strict compliance with the "'trusts.' It is, I think, obvious that if an art gallery is to be "attractive or indeed of use to the public there must be periodical "changes of the pictures, etc., on view and indeed special exhibi-"tions, and that storage and unpacking facilities must be provided "on the hereditament, and it is obvious also that from these areas "the public must be excluded. It is, I think, also obvious that "these areas must occupy in proportion to the whole a larger area "than in, for instance, the case of a public park, though even in the "case of a public park in which extensive bedding out takes "place, it may be necessary to exclude the public from substan-"tial areas used as nursery grounds. I am satisfied that the "exclusion of the public in the present case is properly ancillary "to the management of the art gallery for the benefit of the

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[4] (1950) 43 R. & I.T. 881.

[5] (1952) 45 R. & I.T. 315.

[6] [1952] 2 Q.B. 55; [1952] 1 All E.R. 601, C.A.

[7] (1954) 47 R. & I.T. 172.

[8] [1897] A.C. 625.

[9] [1952] 2 Q.B. 55, 66.

[10] [1952] 2 Q.B. 55, 67.

"public and involves no departure from strict compliance with "the trusts on which the hereditament is held by the respondents "and that this exclusion does not prevent the public from occupying the hereditament.

"I am satisfied, therefore, that the Local Valuation Court "came to a correct decision and this appeal must be dismissed."

The valuation officer appealed. The grounds of appeal were:

"(1) that upon the facts found by it the Lands Tribunal was "wrong in law in deciding that the said hereditament was in "the occupation of the public;

"(2) that upon the said facts the said hereditament was in the "rateable occupation of the respondents;

"(3) that the principles laid down in *Lambeth Overseers* v. "*London County Council*[11] [the *Brockwell Park* case] do not "apply to a hereditament consisting, or primarily consisting, of "buildings;

"(4) that the parts of the said hereditament from which the "public were excluded formed so great a proportion of the whole "that the Lands Tribunal was wrong in law in deciding that the "public were in occupation of the said hereditament;

"(5) that the decision of the Lands Tribunal was wrong in "law."

The following further facts had been admitted: (a) no public park or other land was attached to the hereditament; (b) the total area from which the public was excluded was approximately one-third of the total area of the hereditament.

W. Roots Q.C. and *Raymond Phillips* for the appellant, the valuation officer. The respondents, the Kingston-upon-Hull Corporation, contend that this public art gallery is not rateable because it falls within the principle applied in *Lambeth Overseers* v. *London County Council* (the *Brockwell Park* case)[11] and *Burnell* v. *Downham Market Urban District Council.*[12] In the one case it was held that a public park, and in the other a pleasure ground, were not rateable because no person was in rateable occupation. It is no longer contended that the Scientific and Literary Societies Act, 1843, has any application here. In *Hare* v. *Putney Overseers*[13] it was held that Putney Bridge was not in anyone's rateable occupation. The public had a right of passage over the whole of the highway. The highway authority's only right was to repair the highway and to regulate the traffic. That was the type of user which was considered in the *Brockwell Park* case.[14] It was a user by the public fundamentally different from the user by the public of a picture gallery. In the *Brockwell Park* case [14] the House of Lords affirmed the decision of the Court of Appeal [15] reversing the Divisional Court. The speeches in the House of Lords show that the decision was founded on the *Putney Bridge* case,[16] and that there was no rateable occupation. The public had rights over the whole of Brockwell Park. The public itself is not a rateable occupier. Both in the case of the highway and of the park the public use exhausted the whole possibility of use. Brockwell Park was dedicated to the public in perpetuity under the London County Council (General Powers) Act, 1890, and the London County Council had no right to sell the park. In the *Downham Market* case [17] the same principle was applied to a playing field dedicated to the perpetual use of the public for the purposes of exercise and recreation under the Open Spaces Act, 1906. The mere fact that land is held for public purposes does not of itself mean that it is not rateable. In *London County Council* v. *Churchwardens, etc., of Erith Parish and Dartford Union Assessment Committee*,[18] a pumping station and sewage works owned by a local authority was held to be rateable. In *Queen* v. *London School Board* [19] it was held that a local authority was the rateable occupier of a school. In Ryde on Rating, 10th ed., p. 222, the ground of the non-rateability of land over which the public has exclusive rights is that such land is "struck "with sterility." The question whether any pecuniary profit can be obtained from the land is not conclusive. In *Liverpool Corporation* v. *West Derby Union* [20] it was held that a public library was rateable. The possibility that premises may be sold is a factor in determining the nature of the public's rights.

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[11] [1897] A.C. 625.

[12] [1952] 2 Q.B. 55, C.A.

[13] (1881) 7 Q.B.D. 223, C.A.

In the case of a public park the whole of it is used by the public except small parts reserved for the maintenance of the park and for ancillary purposes. In the case of a library or art gallery the public are invited to come onto the premises to read the books or to see the pictures. They have no control over the books or pictures which are exhibited. In this case they are excluded from one-third of the premises. In the case of a park the public can exhaust the whole use of the land. That is not so in the case of an art gallery. There is an inherent difference between the rights of the public over an open space and those in a building. This appears from the decision in *Trustees of Sir John Soane's Museum* v. *St. Giles and St. George's Joint Vestry*.[21] In Ryde on Rating, 10th ed., p. 17, it is stated that to constitute a person the "occupier" of land for rating purposes he must have a de facto possession, that is, actual physical prehension of the particular portion of the soil to the substantial exclusion of all other persons from participating in the enjoyment of it. This case is analogous to the decision in *Liverpool Corporation* v. *West Derby Union*,[22] where it was held that a public library was rateable, and not the decisions dealing with a public bridge, park or playing field.

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[14] [1897] A.C. 625.

[15] [1896] 2 Q.B. 27, C.A.

[16] 7 Q.B.D. 223, C.A.

[17] [1952] 2 Q.B. 55, C.A.

[18] [1893] A.C. 562; 10 T.L.R. 1, H.L.

[19] (1886) 17 Q.B.D. 738; 2 T.L.R. 633, C.A.

[20] (1905) 92 L.T. 467, C.A.

Raymond Phillips following. In the second finding of fact it is stated that the public is excluded from one-third in area of the gallery. It is absurd to say that the public is, in fact, in occupation of the building as a whole. In the case of an art gallery, the public must always be excluded from a large part of it. The public in the case of a park is not excluded from anything like as large a proportion of the hereditament.

Peter Rawlinson Q.C. and *J. P. Harris* for the respondents, the Kingston-upon-Hull Corporation. This gallery is within the principle laid down in the *Brockwell Park* case.[23] The real ground of the decision of the House of Lords in that case was that there was there no rateable occupation since the public is not a rateable occupier. For there to be no rateable occupier two tests must be satisfied: (1) the public's right must be irrevocable; (2) the public must have an unrestricted right of use: see Ryde on Rating, 10th ed., pp. 229, 230. The public was held to have an irrevocable right of unrestricted use in the *Brockwell Park* case.[23] It is difficult to see how the public could be said to have been in occupation of buildings occupied, in fact, by servants of the London County Council. Their occupation was, however, held to be merely ancillary to the use by the public. The use of parts of this gallery by the director and attendants of the gallery is like the occupation of the gardeners of Brockwell Park. They are there to ensure that the public can make the best use of the gallery. This case is distinguishable from *Liverpool Corporation* v. *West Derby Union*.[24] That was a case of a public library

[21] (1900) 83 L.T. 248.

[22] 92 L.T. 467, C.A.

[23] [1897] A.C. 625.

[24] 92 L.T. 467.

owned by a local authority. There the local authority had power to sell the library and to apply the property for other purposes. The local authority has no such power in this case. Here, under the trust instrument, this art gallery is irrevocably dedicated to the public. The legal owners, the local authority, are merely custodians and are not in occupation.

In the *Putney Bridge* case,[25] the public in fact only used a small proportion of the whole bridge; the rest of the bridge was, however, only ancillary to that user. It is for the Lands Tribunal to decide, as a question of fact, whether the part of a hereditament not used by the public is merely ancillary to that so used.

The importance of the two tests appears from the decision in *Soane's Museum* case [26] and the decision in *Sheffield Corporation* v. *Tranter (Valuation Officer)*.[27] In *North Riding of Yorkshire County Valuation Committee* v. *Redcar Corporation*,[28] it was held that there was beneficial occupation of the foreshore because part of it could be occupied for commercial purposes. The true test whether the local authority is in occupation appears from the observations of Lord Evershed M.R. in the *Downham Market* case [29] to be whether the limited exclusion of the public is properly ancillary to management. Since the decision in *London County Council* v. *Churchwardens, etc., of Erith and Dartford Union Assessment Committee*,[30] the mere fact that land is occupied for public purposes does not mean that it is not rateable. Here, the local authority undertook to act as the custodian of this gallery for a private individual. The local authority cannot charge for the use of the gallery. It is saddled with a building which cannot be used for any purpose other than an art gallery. This case is distinguishable from the *Erith* case,[30] since here the local authority cannot make a charge. The local authority has no beneficial occupation. The public's rights are overriding rights. It matters not whether the premises are an open space or a building. If the rights of the public are overriding, the premises are within the principle of the *Brockwell Park* case.[31] This art gallery is within that principle.

J. P. Harris following. It is necessary to consider clause 5 of the deed which establishes this art gallery and the rights of the public. The only powers of the corporation are to hold and administer the property as trustees. Any other persons could have been selected to act as trustees. The corporation hold the premises on behalf of the public. Clause 5 gives to the public the free and unrestricted use of the gallery. The principle of the *Putney Bridge* case[32] is not limited to highways, it has been extended to parks. [*Bowes Museum & Park Trustees* v. *Cutts*[33] was referred to.]

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[25] 7 Q.B.D. 223, C.A.

[26] 83 L.T. 248.

[27] [1957] 1 W.L.R. 843; [1957] 2 All E.R. 583, C.A.

[28] [1943] K.B. 114; 59 T.L.R. 38; [1942] 2 All E.R. 589.

[29] [1952] 2 Q.B. 55, 68, C.A.

[30] [1893] A.C. 562, H.L.

[31] [1897] A.C. 625, H.L.

W. Roots Q.C. in reply. When the owner is in possession, prima facie he is in rateable occupation, unless it is shown that the rateable occupation is in someone else: see *Doncaster Union Assessment Committee* v. *Manchester, Sheffield and Lincolnshire Railway Co.*[34] If the facts establish that the public is in occupation, then the principle of the *Brockwell Park* case[35] applies. The onus is on the corporation of showing that the public has displaced the occupation of the corporation. It is not agreed that under these trusts the corporation cannot charge the public for admission. If there is a power to charge, the case cannot fall within the principle of the *Brockwell Park* case.[35] The whole basis of their Lordships' speeches in that case was that the public had a free and unrestricted right of user under the London Council (General Powers) Act, 1890.

With regard to the question of beneficial occupation: there does not appear to be any decision where exemption has been obtained because there was no beneficial occupation by reason of the rights of the public. The test of beneficial occupation is not whether a profit can be made but whether the occupation is of value. In the *Liverpool Free Library* case,[36] the local authority had a power of sale.

With regard to the facts: If there is here a general right to charge for admission and also to use the gallery for exhibitions, there is no exemption from rating within the authorities. There is a difference for rating purposes between the golf club house and the greens of the golf course where these are on ground over which the public has unrestricted rights to wander at will: *Peak (Valuation Officer)* v. *Burley Golf Club.*[37] Similarly there is a distinction between the position of a gallery and that of a park or highway for rating purposes. The principle of the *Putney Bridge* case [38] and of the *Brockwell Park* case [39] should not be extended to a picture gallery.

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[32] 7 Q.B.D. 223.

[33] (1950) 43 R. & I.T. 881.

[34] [1895] A.C. 133n.; 10 T.L.R. 567, H.L.

[35] [1897] A.C. 625, H.L.

[36] 92 L.T. 467.

[37] [1960] 1 W.L.R. 568; [1960] 2 All E.R. 199, C.A.

Cur. adv. vult.

November 10. The following judgments were read.

LORD EVERSHED M.R. The claim of the appellant valuation officer in this case is that the Lord Mayor, Aldermen and Citizens of Kingston-upon-Hull—that is, the Kingston-upon-Hull Corporation—are in rateable occupation of the Ferens Art Gallery, Victoria Square, in that city. The answer of the corporation, which found favour with the Lands Tribunal, is that the result of the obligations imposed on the corporation, by certain deeds made in the years 1919 and 1928 between the late Mr. Ferens and the corporation, is that any "occupation" by or on behalf of the corporation is in the character of mere custodians for the public; that, accordingly, the "occupation" by the corporation has no "beneficial" or other quality sufficient to attract liability to rates; and that the principle applied in *Lambeth Overseers* v. *London County Council* [1] (the *Brockwell Park* case) and *Burnell* v. *Downham Market Urban District Council* [2] to parks or open spaces is no less applicable to a public art gallery, such as the Ferens Gallery.

If the matter were free from authority and could be judged by common sense and the ordinary usages of language, I should, I confess, feel little doubt that the tests of "occupation" applicable in the case of a public park or a public open space would have little reference to a public art gallery controlled and managed as is the gallery in the present case. The facts in the case appear to have been agreed and are set out in the decision. They are such as you would expect them to be. Though no one sleeps on the premises, they are under the control of a director and assistant director responsible, with the staff necessary for the purpose, for the maintenance, repair, decoration, lighting, heating, etc., of the building and for its ordinary security. It is open to the public during certain hours in the daytime. No admission fee appears to be charged and no regulations seem to have been made or published. There is no evidence of the ownership or character of the pictures or other works of art displayed. The area open to the public is approximately two-thirds of the whole. The remaining parts of the building, to which the public are not admitted, are used for the ordinary purposes, that is to say, as offices, store rooms, etc., normally appropriate to the use of the building as an art gallery.

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[38] 7 Q.B.D. 223, C.A.

[39] [1897] A.C. 625, H.L.

[1] [1897] A.C. 625; 13 T.L.R. 527, H.L.

[2] [1952] 2 Q.B. 55; [1952] 1 All E.R. 601.

On this basis of fact the question " Are the premises occupied " and if so by whom? " when applied to this art gallery would, as I have said, appear to me to yield, according to common sense and use of language, quite a different answer to that appropriate to the same question when related to a public park or open space. In the latter case the sensible answer would to my mind be—in any ordinary acceptance of language—that the park or open space is not " occupied " by anyone; the public have, when the gates are open, free and unrestricted access to the whole of it, save only such buildings or places as are reserved for the use of the park keepers or custodians. But in the case of a building, such as the present gallery, I should have thought that the sensible answer was no less certainly that it was " occupied " by those whose function it is to maintain the building in the ordinary way as such and not the less so because, during the specified hours of the daytime, members of the public are admitted to look at the works of art displayed.

It is well established that where more than one person or set of persons have rights to be in or upon a building, that person or set of persons having the control and regulation of the building is treated as the rateable " occupier " (see *Westminster City Council* v. *Southern Railway Co. & Others*,[3] *per* Lord Russell of Killowen). It is also well established that " occupa- " tion " in order to attract liability to rates must be " beneficial " occupation." But that phrase does not mean " profitable " occupation " and may be satisfied by occupation in discharge of a statutory duty or statutory power or for discharging the duties of a trustee—see, for example, the case cited to us of a public library, *Liverpool Corporation* v. *West Derby Union*.[4] It has also been clearly established since the case of *Jones* v. *Mersey Docks and Harbour Board Trustees*,[5] as was pointed out in the speeches in the *Brockwell Park* case,[6] that the fact of a property being held for public purposes does not deny " beneficial occupation " in the occupier.

In the *Brockwell Park* case[6]—which followed the case relating to Putney Bridge, *Hare* v. *Putney Overseers*,[7] and was in turn followed by this court in the *Downham Market* case[8] relating to a war memorial playing field—it was held by the House of Lords that the right of the public to the use and enjoyment of the park was "free and unrestricted," save only for those buildings reserved by the London County Council for the purposes of management and conservation of the park, activities purely ancillary to the general purpose of the public park and occupying together a very small area compared with that of the park as a whole. It appears from the relevant Act of Parliament under which the London County Council acquired the park, that its duty to give to the public "free and unrestricted" access was perpetual and involved a denial of any right to charge an entrance fee. In the *Downham Market* case[8] this court held that the public were entitled to a similar "free and unrestricted "access"—the power of the local authority on occasion to close the field and charge an entrance fee, as for a hospital fete, being minimal in effect; and the power of the authority in certain circumstances to sell the field no more qualifying for practical purposes the "permanence" of the public right of enjoyment than the possibility of the London County Council getting a special amending Act in regard to Brockwell Park.

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[3] [1936] A.C. 511, 529, 530, H.L.

[4] (1905) 92 L.T. 467.

[5] (1865) 11 H.L.C. 443.

[6] [1897] A.C. 625.

In their speeches in the House in the *Brockwell Park* case[9] both Lord Halsbury L.C. and Lord Herschell refer to, and appear to base themselves upon, the dual grounds of free and unrestricted user by the public and of the absence of any beneficial occupation in the London County Council. Lord Halsbury L.C. at the beginning of his speech, said[10]: "I do not think there is here "a rateable occupation by anybody. The 'public' is not a rateable "occupier; and I think that one sentence disposes of the case." Later, he continued: "Once it has been found, as in this case, "that the occupation cannot as a matter of law be a beneficial "occupation, there is an end of the question. I say as matter "of law, because that it does not give a beneficial occupation as "matter of fact is nothing to the purpose. Here there is no "possibility of beneficial occupation to the County Council; they "are incapable by law of using it for any profitable purpose; "they must allow the public the free and unrestricted use of it."

Lord Herschell said[11]: "No tenant would give anything for "them"—that is to say, the park and buildings thereon—"seeing

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[7] (1881) 7 Q.B.D. 223.

[8] [1952] 2 Q.B. 55.

[9] [1897] A.C. 625.

[10] Ibid. 629, 630.

[11] Ibid. 631.

"that every part of them is dedicated to the public use, and that "the small sums of money which might be received in respect of "them would, as the case finds, be more than absorbed by the "expense of keeping them in order." On the following page he said: " . . . I am not satisfied that the county council are occupiers "of this park for rating purposes, though the legal possession is, "no doubt, vested in them. They seem to me to be merely "custodians or trustees to hold it and manage it for the use of "the public."

But as pointed out by Kennedy J. in the *Liverpool Corporation* (public library) case,[12] the two things are in truth manifestations of the single, decisive, proposition, viz., that on the facts of the *Brockwell Park* case[13] the free and unrestricted user by the public was exhaustive and exclusive of any right to any occupation, or at any rate any beneficial occupation, in anyone else. By way of distinction, the Divisional Court in the *Liverpool Corporation* case[14] emphasised the absence of any statutory or other obligation to continue to allow the premises there in question to be used as a public library for any particular length of time, still less in perpetuity.

I do not say that the principles of the *Brockwell Park* case[15] cannot be applicable to a building as opposed to an open space. It may well be that if a public authority acquire a piece of land and erect upon it, say a public shelter, and thereafter hold the property by virtue of some statute or of a deed of trust under the obligation to maintain it as a public shelter for all time, the public could be said to have such right of free and unrestricted user and would be exhaustive and exclude any "beneficial "occupation" in the authority. But the question here is: what is the nature and what the extent of the public rights to or in the Ferens Art Gallery? So far as I can see such rights are to be found and found only in the final words of clause 5 of the trust deed of December 9, 1919. The words are: "Upon trust to permit "the same to be used and enjoyed by the citizens of the said "City and County of Kingston-upon-Hull and the public generally "as an art gallery for the exhibition of works of art in perpetuity." True it is that the last two words impose a permanent obligation, but I cannot see that a charge for admission to help towards provision for the cost of maintenance would be inconsistent with the use of the premises by the public "as an art gallery."

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[12] 92 L.T. 467.

[13] [1897] A.C. 625.

[14] 92 L.T. 467.

[15] [1897] A.C. 625.

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Further, if on occasion or in some part of the building works of art were displayed which were lent for the purpose and were of very great value, I see nothing in the obligation, which I have quoted, which would prevent the making of regulations restricting the passage of the public in the rooms for the better security of the exhibits. In other words, I cannot accept the argument that in the case of premises used—in the ordinary acceptance of the word—as a public art gallery, the right of the public necessarily involves or must be comparable to the "free and "unrestricted user" by the public of an open space.

After paying therefore, as I hope, due regard to the language and reasoning in the cases binding upon us, I have nevertheless in the end come to the same conclusion that, as I stated at the beginning of this judgment, appeared to flow from the application of common sense and ordinary language.

I add one further consideration: if the question be asked, relevant in all rating cases, what, if any, rent might be payable for a tenancy of the premises subject to the obligation of the overriding trusts affecting them, I am by no means satisfied that the answer would necessarily be "nil." A great amateur of the arts might well pay a rent for the premises in order to enable him, by the exhibition of works of art belonging to or borrowed by him, to increase public interest in and appreciation of the arts. And he would be more inclined so to do if he happened himself to be a painter or sculptor and therefore able to exhibit his own works—and offer them for sale—in one room of the premises. Similar considerations might, I conceive, apply to a person or company carrying on business as an art dealer, and the result would in neither case disqualify the premises as a public art gallery or involve any failure in observance of the terms of the trust deed.

Harman L.J. The decision of the lands tribunal from which this appeal arises, if it be good law, must have important effects for it extends to public buildings held for public purposes the freedom from rateability established in regard to various open spaces by a line of cases of which the prototype is *Hare* v. *Overseers of Putney*[16] and the leading case the *Brockwell Park* case.[17] Now in my judgment the true ratio decidendi in these cases is that no one is in occupation at all and therefore no one

[16] 7 Q.B.D. 223.

[17] [1897] A.C. 625.

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rateable. This is easily seen in the first case which was concerned with Putney Bridge. It would be extravagant to say that the public occupies Putney Bridge but true to say that the public has such extensive rights over it as entirely to exclude any beneficial occupation in the owners, who are mere custodians. The *Brockwell Park* case [17] was perhaps a slight extension of this line of reasoning, for there the London County Council did exercise some control, shutting the park at night and having certain buildings in the park which they controlled, but these powers of control were strictly ancillary to the maintenance of the park for the use of the public and the House concluded that they were not enough to make it untrue to say that the public had, as the Act of Parliament provided, free and unrestricted access. It is true that Lord Halsbury L.C. expressed the view, by implication, that the public was in occupation, but the following paragraph shows his true view in these words [18]: " . . . as " I have said, I think there is no occupation at all, the county " council being merely custodians and trustees for the public." As to the further point discussed in that case, namely, whether there was a beneficial occupation, it is clear that neither Lord Halsbury L.C. nor Lord Herschell considered that the word beneficial meant profitable. Lord Halsbury L.C. for instance says [18]: " Once it has been found, as in this case, that the " occupation cannot as a matter of law be a beneficial occupation, " there is an end of the question. I say as matter of law, because " that it does not give a beneficial occupation as matter of fact is " nothing to the purpose."

It is possible that the *Downham Market* case [19] was an extension of the principle in a different direction, because there the dedication to the public was by deed and not statute, but that aspect of the matter is of no importance here.

The tribunal's decision therefore amounts to this: that this building is an unoccupied building, and this seems to me clearly wrong. It is not in fact unoccupied. It is not in law occupied by the public, whose only right is to enjoy the advantages of a picture gallery. It is on the other hand, in my judgment, occupied by the corporation under the deeds which my Lord has already cited.

Time was when land held for public purposes was held on that account not to be rateable, but that time has long gone by.

[17] [1897] A.C. 625.

[18] Ibid. 630.

[19] [1952] 2 Q.B. 55.

See the speech of Lord Herschell in *London County Council* v. *Church Wardens, etc., of Erith Parish and Dartford Union Assessment Committee*[20] where he says: "The decision "of this House in *Jones* v. *Mersey Docks*[21] marks an "epoch in the law of rating. Many of the earlier decisions "are tainted with this vice, that they proceed upon the supposition that lands held for public purposes are on that account "not rateable. This doctrine is now exploded, your Lordships' "House having distinctly determined that the circumstance that "land is held by a public body for public purposes does not "affect its rateability."

It is not then the fact that the purposes concerned are public purposes that will absolve the occupiers, if there are any, from rates. As I have already said, I cannot think this can be treated as an unoccupied building. It is in fact actively used and occupied every day of the week. It is vested in possession in the corporation who are, therefore, prima facie, the occupiers: see Ryde on Rating, 10th ed., p. 20, and cases there cited. Unless, therefore, they occupy merely as custodians or, in other words, unless the rights of the public are such as to exclude all possibility of beneficial occupation by the trustees, then the occupation on the part of the owners will be treated as beneficial for rating purposes.

The answer to this last question must rest upon the document of trust. The trusts are declared with a remarkable lack of particularity—"to permit the same"—that is, the building—"to be used and enjoyed by the citizens of . . . Hull and the "public generally as an art gallery for the exhibition of works of "art in perpetuity." I suppose that the trust has been delegated to the appropriate committee of the corporation. This body acts through its appointee, the curator and his staff, but apparently has not thought it necessary to issue any by-laws for the regulation of the gallery. There is nothing in the trust about the public enjoying free and unrestricted access. The public is entitled to enjoy the property "as an art gallery." What does this mean? It must mean, in my judgment, that the corporation is to conduct upon the property an art gallery in the usual way of such resorts. I see no reason why the public should not be charged at any rate such a sum as will supplement the inadequate upkeep fund even if not sums which will augment the fund for the purchase of works of art. I see no reason why the gallery may not be closed, say on Thursdays, for the use of art students. Indeed, I see no reason why the corporation should not let or lend the gallery or specific parts of it for the exhibition of works of art on loan, whether by some body like the Arts Council or by a wealthy patron or, indeed, an impresario wishing to make a profit. In these circumstances, it seems to me that the corporation is truly the managing owner and occupier of the building, and that its position is quite unlike that of the mere custodian of an open space and much more clearly akin to the trustees of the Soane Museum who were held rateable in *Trustees of Sir John Soane's Museum* v. *St. Giles in the Fields and St. George's, Bloomsbury, Joint Vestry.*[22] For these reasons I agree with the Master of the Rolls that the appeal should be allowed.

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[20] [1893] A.C. 562, 585; 10 T.L.R. 1, H.L.

[21] 11 H.L.C. 443.

DONOVAN L.J. This is an appeal by way of case stated from a decision of the Lands Tribunal that the Ferens Art Gallery at Hull is exempt from rating having regard to the decision of the House of Lords in *Churchwardens and Overseers of Lambeth Parish* v. *London County Council*,[23] commonly referred to as "the *Brockwell Park* decision." The appellant valuation officer contends that that case has no application to the present.

The salient facts in the *Brockwell Park* case [23] were that the London County Council had under the London Council (General Powers) Act, 1890, power to purchase the park; and if the council exercised the power, were—under the same Act—to hold the property as a park, and maintain and preserve it as a park, for perpetual use by the public for exercise and recreation. The power to purchase was exercised and the park conveyed to the London County Council "to the use of them, their successors "and assigns for ever to the end and intent that the same might "be used as and for a public park." And as for the prescribed purposes of exercise and recreation, the council provided, inter alia, 30 lawn tennis grounds and 13 cricket pitches for the use of which, it seems reasonable to infer, some small charge was made. The previous private owner had been assessable to rates in respect of the park and a Divisional Court held that the London County Council in turn were likewise rateable. The Court of Appeal reversed that decision and its judgment was upheld in the House of Lords.

In the Court of Appeal,[24] the decision against rateability was based upon the absence of beneficial occupation. A. L. Smith

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[22] (1900) 83 L.T. 248.

[23] [1897] A.C. 625.

[24] [1896] 2 Q.B. 25.

L.J. pointed out that an authority discharging some public duty and having property vested in it for the purpose was still to be regarded for rating purposes as one of the hypothetical tenants. On that basis its occupation could be beneficial, for if the authority did not own the premises it might have to rent them to discharge the duty. But the London County Council were under no obligation to provide parks for the public; and in the case of Brockwell Park the outgoings far exceeded any possible income. Accordingly, upon the hypothesis that any tenant of the hereditament would be bound under the Act of 1890 to maintain it as a public park, such tenant would make an annual loss, and could not therefore be expected to pay any rent. The park was not, therefore, rateable.

The House of Lords agreed with this view, but decided the case on the broader ground that there was no rateable occupation by anybody. There was obviously physical occupation, for example, by the council's servants, some of whom dwelt in cottages being part of the park. But for rating purposes the public were in occupation. Lord Halsbury L.C. said[25]: "I do "not think there is here a rateable occupation by anybody. The "'public' is not a rateable occupier." And again: "It appears "to me that the nature of the occupation here is such that there "can be no rateable occupation." Lord Herschell said[26]: "Here these very lands and every part thereof, by statute, must "be held in perpetuity for the use of the public, and the question "is, whether, under these circumstances, they are rateable at all. "I think that on principle they are not."

In the case before us, one Thomas Ferens, a citizen of Hull, on December 9, 1919, conveyed to the Hull Corporation for a nominal consideration of 10s. a plot of land in Victoria Square in Hull, together with a church on part of the site, to hold the same unto and to the use of the corporation, but subject to the trusts comprised in an indenture of even date made between the same parties. That indenture recites the conveyance and further that Mr. Ferens, being desirous of providing for the erection by the corporation of an art gallery upon the said land for the use of the citizens of Hull and the public generally, had transferred certain investments to the corporation worth some £48,000.

The trusts declared in respect of these investments were that the corporation should convert the same into money when they thought fit and use the fund to erect an art gallery on the land within five years. The trusts declared in respect of the land were that the corporation should hold it and the art gallery to be erected on it " upon trust to permit the same to be used and " enjoyed by the citizens of the said City and County of Kingston-" upon-Hull and the public generally, as an art gallery for the " exhibition of works of art in perpetuity."

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[25] [1897] A.C. 625, 629, 630.

[26] Ibid. 632.

It is to be noted that by the same deed the corporation covenanted to demolish a public lavatory which stood upon land adjacent to that conveyed by Mr. Ferens, and the site of the lavatory was to be comprised in the site for the art gallery. I do not think that anything turns upon this. It is reasonable to suppose that this additional ground was a very small part of the whole.

A third deed of March 15, 1928, between the same parties, after reciting that the building of the art gallery had been postponed by mutual arrangement, but that the gallery was now complete and properly fitted up, and open to the public, and that a residue remained of the original fund of £48,000, such residue amounting to upwards of £20,000, provided as follows: £22,500 was to be set aside as an endowment fund, and the income from £2,500 of this fund was to be applied towards the cost of maintenance and upkeep of the art gallery.

The income of the balance of the fund was to be applied in defraying the cost of works of art, which the corporation might from time to time acquire, for exhibition in the art gallery. The residue of the funds still in the hands of the corporation was to be known as " The Purchase Fund," and was to be applicable, both as regards capital and income, in defraying the costs of acquiring works of art for exhibition in the gallery.

In this way Mr. Ferens provided an art gallery for Hull to be used and enjoyed as such in perpetuity by the public. The parties agree that the effect of the deeds was to make the corporation trustees of a valid charitable trust, and I think this is right.

From its opening in 1928 until 1958 no attempt was, we were told, made to charge rates in respect of the gallery; but the present proposal was then made to enter it in the valuation list with a gross value of £4,700 and a rateable value of £3,913.

In my opinion such a proposal is in conflict with the principle upon which the House of Lords held that Brockwell Park was exempt. That principle was that the public were in occupation of the park and therefore not rateable, and that conclusion derived in turn from the circumstance that the park and every part thereof had to be held in perpetuity for the use of the public. The same is true of the art gallery in the present case, and it can make no difference that in the one case such dedication to public use was by statute and in the other by voluntary trust. The same principle was, in my respectful opinion, applied in this court in *Burnell* v. *Downham Market Urban District Council*,[27] which dealt with a recreation ground held upon trust for the public, and is expressed in the concluding words of the judgment, namely: "the council "were mere trustees or custodians for the public and accord-"ingly . . . the real occupiers for present purposes are the public "themselves."

Mr. Roots, for the appellant valuation officer, argued that the public could not in any real sense be said to occupy a building as it could be said to occupy a park. But just as the public goes to Brockwell Park to enjoy its amenities, so the public goes to this art gallery to enjoy what it has to offer—in both cases in exercise of permanent public rights. Mr. Roots also said that the public rights in relation to Brockwell Park "exhausted" its occupation. I am not sure what this means, it may be an expression in different language of the argument with which I have just dealt.

An alternative contention for the appellant is that since the public is excluded from one-third of the hereditament the public has not "free and unrestricted" use of the gallery and is, therefore, not in occupation of it. This argument necessarily concedes that the public may be in occupation of such a building as this, because otherwise the contention would be irrelevant. It is admitted, however, that this one-third is used for purposes necessary and ancillary to the running of the gallery, that is to say, storage of works of art, restoration of pictures, heating and lighting, and so on. The tribunal held that the physical exclusion of the public from this portion of the hereditament was not, in the circumstances, inconsistent with occupation of the whole by the public. I agree with this conclusion and with the reasons for it given by the tribunal.

The decision in *Liverpool Corporation* v. *West Derby Union*,[28] dealing with the case of a public library, is, I think, distinguishable. There the hereditament was not held in trust solely for the public. It was the corporation's own property, bought by the corporation, and if some other building were ever substituted as the library, the corporation could sell the unwanted building and use the proceeds for different corporation purposes. That was

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[27] [1952] 2 Q.B. 55, 69.

[28] 92 L.T. 467.

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a case, in my view, of a corporation occupying its own building as a local authority for public purposes. The present is, I think, a case of a corporation occupying a building as a trustee, and managing it on behalf of the public. The distinction is no doubt a fine one, but it exists, as the *Brockwell Park* case [29] and the *Downham Market* case [30] show.

In the argument before us a further question was canvassed, namely, even assuming that the corporation were in occupation of the gallery, their occupation was of any value. To be rateable it has to be shown that "the occupation should be of "value beyond what is required to maintain the property; for "if the occupation be of so little value that the hypothetical "tenant . . . would either give no rent, or a rent which after "deducting the average annual expense of the maintenance, "would leave no overplus, there is nothing to rate." See *Jones* v. *Mersey Docks & Harbour Board Trustees*,[31] *per* Lord Blackburn. In the present case the valuation officer's figures mean that in his view the gallery would be sufficiently valuable to a hypothetical tenant that he would be willing to pay practically £4,000 a year rent for it. When it is remembered that such a hypothetical tenant would have to respect the trust upon which the building is held, this seems very unlikely. But this aspect of the matter was never canvassed before the tribunal, the parties arguing the sole question whether the corporation were in occupation at all. The question whether, if so, the occupation was beneficial depends on facts and figures not before us; and upon the questions whether a hypothetical tenant—other than the corporation—would be presumed to be with or without the income from the endowment and the purchase funds; and whether under the terms of the trust a charge could be made for admission to the gallery. If, therefore, beneficial occupation were the crucial question, I think the case would have to go back to the tribunal for a determination thereof after hearing such further evidence and arguments as the parties wished to adduce.

In my opinion, however, the tribunal's decision that the public are in occupation of the hereditament is correct, and this appeal should be dismissed. I respect the contrary opinion of my brothers and, in the absence of authority, might have shared it. I feel precluded from doing so, however, since all the features of the case which they regard as making the corporation

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[29] [1897] A.C. 625.

[30] [1952] 2 Q.B. 55.

[31] 11 H.L.C. 443, 461.

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occupiers here, are matched by corresponding features in the *Brockwell Park* decision[32]; and I feel that that case cannot be satisfactorily distinguished, except by tacitly accepting what was the valuation officer's principal contention: that there cannot be occupation of a building by the public where management and control of it is in some other party. I do not believe that contention to be sound. It would otherwise have provided a very short cut to the decision in *Liverpool Corporation* v. *West Derby Union*[33] and *Trustees of Sir John Soane's Museum* v. *St. Giles and St. George's Joint Vestry*,[34] which the courts deciding those cases could hardly have missed.

Appeal allowed with costs.
Declaration that the hereditament was not exempt from rating.
Leave to appeal to the House of Lords.

Solicitors: *Solicitor of Inland Revenue; Town Clerk, Hull.*

B. A. B.

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[32] [1897] A.C. 625.

[33] 92 L.T. 467.

[34] 83 L.T. 248.

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Nov. 29, 30;
Dec. 6.

Sellers, Pearce and Devlin L.JJ.

ATTORNEY-GENERAL AND ANOTHER *v.* ST. IVES RURAL DISTRICT COUNCIL AND ANOTHER.

[1958 A. No. 122.]

Land Drainage—Maintenance—Liability for repair and maintenance of drains—Whether responsibility of rural district council or county council—Local Government Act, 1929 (19 *&* 20 *Geo.* 5, *c.* 17), *s.* 30 (1).

Land farmed by the plaintiff had from time to time been seriously flooded partly as a result of the non-repair of two drains which ran adjacent to and through the land. By an award under the Enclosure Act, 1800, the drains were maintainable by the surveyor of the highways of the parish; subsequently these duties were transferred to the local highway board and by the Local Government Act, 1894, they were transferred to the rural district council. The question was whether the responsibility for maintaining and repairing the drains now lay on the county council

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as highway authority by virtue of section 30 (1) of the Local Government Act, 1929,[1] and not as hitherto on the rural district council:—

Held, that on the true construction of section 30 (1), the rural district council retained functions inherited from the surveyor of highways unless they were "functions with respect to highways," and the question whether a function was a function "with respect to "highways" had to be answered as a matter of fact by contemporary consideration of the land itself and not by consideration of the award under the Enclosure Act, 1800.

Judgment of Salmon J. [1960] 1 Q.B. 312; [1959] 3 W.L.R. 373; [1959] 3 All E.R. 371 affirmed.

APPEAL from Salmon J.

The plaintiff, Thomas Brownlee Paisley, was a farmer who farmed land in the parish of Holywell-cum-Needingworth in the county of Huntingdon. Two drains known as Parsons Drove and Heath Drain ran adjacent to and passed through the plaintiff's land. These drains were originally natural watercourses. They were small tributaries of the Great Ouse and the natural drains for the land on each side of them.

No work had been done on these drains since 1947. At the date of the issue of the writ the drains had for years been seriously choked, overgrown and silted and were generally in a very bad condition. The plaintiff's land had from time to time been seriously flooded partly as a result of the non-repair of the drains. This flooding had interfered with his farming activities and caused him damage.

The plaintiff brought this action claiming (1) a declaration that the first defendants, St. Ives Rural District Council, alternatively the second defendants, Huntingdon County Council, were bound in law to maintain the drains and keep them in repair; and (2) damages against one or other of the defendants. There was joined to this claim a claim by Her Majesty's Attorney-General, on the relation of the plaintiff, for a declaration in the same terms as that claimed by the plaintiff personally. It was common ground that the duty to keep the drains in proper repair lay on one or other of the defendants.

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[1] Local Government Act, 1929, s. 30 (1): "As from the appointed "day, every county council shall be "the highway authority as respects "such part of the county as is for "the time being comprised in any "rural district and as respects the "highways therein, and as such shall "have all such functions under the "Highway Acts, 1835 to 1885, as "were exercisable by rural district "councils who by virtue of the Local "Government Act, 1894, became "successors of highway boards, and "rural district councils shall cease "to be highway authorities: Provided that nothing in this section "shall affect the functions of rural "district councils under the Local "Government Act, 1894, as respects "rights of way and encroachments "on roadside wastes, or any functions not being functions with "respect to highways exercisable at "the appointed day by rural district "councils as successors to surveyors "of highways or highway boards."

Salmon J. held, inter alia, that the drains were part of the land drainage scheme, and the function of maintaining and repairing them was not a function with respect to highways within the meaning of the proviso to section 30 (1) of the Act of 1929; accordingly, by that section the duty to maintain and repair the drains was not transferred to the county council but was reserved to the rural district council.

The first defendants appealed.

C. E. Scholefield Q.C. and *G. J. Ponsonby* for the first defendants. The court alone has power to decide which of the two local authorities is liable to repair these drains. This award was made in 1803 under the Enclosure Act of 1800, and the question must be looked at in the circumstances of the law then existing. At that time all repair of the highways lay literally on all the inhabitants of the parish; that went back to the statute of Philip and Mary (2 & 3 Ph. & M. c. 8). The inhabitants repaired the highways themselves under a surveyor, who was elected by them. This system of statute labour continued until 1835, but various statutes were passed in the meanwhile to help the surveyor, in what was in effect a very inefficient manner of working. [He referred to Webb's English Local Government: The Story of the King's Highway, 1913, pp. 30–33.]

It was important that the surveyors should have control of the way in which the drains were cleared for the purpose of maintaining the highway, since the roads would disintegrate if water were allowed to collect on them. Under various local inclosure Acts, the surveyor was the person allotted the task not only of repairing the roads for the benefit of the public but also of paying for the cleansing of the drains: see *Attorney-General* v. *Tamworth Rural District Council.*[2] In that case the rural district council, as successors to the surveyor of highways, was held liable to cleanse the ditches; an attempt was made there to say that the award under the Inclosure Act of 1852 was ultra vires, because the duty was imposed without any advantage, but it was said that the surveyor had the advantage of the highway not being flooded.

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[2] (1901) 85 L.T. 190.

[PEARCE L.J. You are arguing that it was a privilege and not a burden?]

Yes.

The duties of the surveyors were by the Highway Act, 1862, transferred to the highway boards, and by section 25 of the Local Government Act, 1894, which abolished the boards, their functions were transferred to the rural district councils, who became the sanitary and highway authority. Under section 30 (1) of the Local Government Act, 1929, the functions under the Highway Acts, 1835–85, exercised by the rural district councils as successors to the highway boards, passed to the county councils. That was the effect of the positive part of the section, but by the proviso an exception was made to functions "not "being functions with respect to highways." The right persons to judge whether any function was a function "with respect to "highways" were the commissioners who made the award and who had decided who should pay for the cleansing of the drains in the area comprised in the award. There is a distinction between payment for clearance of drains incidental to the highway and drains which have nothing to do with the highway.

There are two aspects of the surveyor's duties with regard to drains given by the award: (a) the cleansing of drains for the protection of the land, and (b) the cleansing of drains which are of assistance for the protection of highways. It is not suggested that all drains were given to surveyors to repair because of their connection with highways; it is a matter of evidence whether the drains affected the highway, and the question must be ascertained by looking at the award in each case. The true judges of fact whether any particular drain did, or did not, affect the highway were the commissioners. Where a drain did not affect the highway at all, the award provided that the money should be recoverable from adjoining occupiers; but where the drain did affect the highway a general rate was imposed; the surveyor could do the work of cleansing the drains as he pleased and collect the money. Statute labour was only used on the roads. If the drain was given to the surveyor in 1803 for highway purposes, its repair was still a highway function in 1929. That decision of fact given by the commissioners in 1803 remained binding for the future. [Reference was also made to section 118 of the Local Government Act, 1919, and section 306 of the Highways Act, 1959.]

J. P. Widgery Q.C. and *Alan Fletcher* for the second defendants. The decision of Salmon J. was correct for the reasons which he gave. Three propositions are submitted, two of law and one of fact. (1) On the true construction of section 30 (1), the rural district council retained the functions which it inherited from the surveyors unless those were functions with respect to highways. (2) The duty of cleaning out a drain is not a function with respect to highways if the principal purpose of that drain is to drain agricultural land, and the drainage of the highway is merely incidental thereto. On the correctness or falsity of that proposition this case may become important in other cases. (3) On the facts of this case the primary purpose of this drain was to drain agricultural land. Those propositions were relied on below and were all accepted by the judge.

As to the question of the construction of section 30 (1), the question below was whether the proviso had any meaning at all or whether it was otiose. The phrase in the proviso "functions "with respect to highways" was put there with the deliberate purpose of separating the functions which the surveyor might have had with respect to highways from those which were not so connected. The surveyor had a variety of functions unconnected with highways, for instance, the maintenance of fen land and the repair of private roads. These would be retained by the rural district councils under section 30 (1). The alternative view is that the proviso means nothing at all, but the court is asked to say that Parliament had some intention, which was the separation of functions connected with highways from those which were not. It makes no difference whether a comma is put in or not after the word "highways."

As to the second proposition, the test which the judge set out in his judgment as to whether the repair of a particular drain was a function with respect to highways is adopted.[3]

The situation in 1803, even if it could be discovered, would not be a final answer whether the repair of a particular drain was, on the appointed day, within the meaning of section 30 (1), a function with respect to highways. Parliament intended at the date of the Act of 1929 to separate the functions, and it is because up to now it has not been possible to agree that broad principle that this difficulty has been created.

Scholefield Q.C. in reply. It is not a question whether they are land drains or highway drains; they are all land drains, but charged in certain instances with other functions with regard to the roads. Strictly speaking, there are no such things as road drains; there is a ditch which feeds the hedges and does drain the road. It is not a question of land drainage against road drainage, but of land drains simpliciter against land drains which had the additional element of serving highway purposes as well. Whether a drain does have that effect can only be discovered by looking at the award.

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[3] [1960] 1 Q.B. 312, 321; post, p. 373.

Arthur L. Figgis for the plaintiff did not address the court.

Cur. adv. vult.

Dec. 6. PEARCE L.J. read the judgment of the court. The St. Ives Rural District Council appeal against a declaration that they are now the authority bound in law to maintain and keep in repair two drains, Parsons Drove and Heath Drain, in the parish of Holywell in Huntingdon. They contend that the liability lies not on them but on their co-defendants, the Huntingdon County Council, by virtue of the Local Government Act, 1929, s. 30 (1).

An award of the commissioners under the Enclosure Act, 1800, ordered that these drains " shall be for ever hereafter maintained and kept in repair . . . by and at the expense of the " Surveyor of the Highways for the time being out of a rate to " be from time to time laid by him on all occupiers of lands and " grounds within the parish of Holywell-with-Needingworth " according to the annual value set by us on such lands and " grounds."

By the Highway Act, 1862, s. 11, the duties of surveyors of highways were transferred to highway boards. By the Local Government Act, 1894, s. 25, highway boards were abolished and their duties were transferred to rural district councils, who became the successors of the rural sanitary authority and highway authority.

It is agreed that thus the St. Ives Rural District Council inherited the duty to repair and maintain these drains. The point in dispute is whether that duty still lies on them or was transferred from them to the Huntingdon County Council by the Local Government Act, 1929, s. 30 (1). [His Lordship read section 30 (1) of the Local Government Act, 1929, and continued:]

The judge held that the subsection apart from the proviso would clearly transfer the liability in respect of these drains to the Huntingdon County Council. For the maintenance of these drains was one of such functions under the Highway Acts, 1835 to 1885, as were exercisable by the rural district council who by virtue of the Act of 1894 became the successor of the highway board.

It is agreed that the judge was right in so holding. The judge then went on to hold that the proviso prevented the transfer to the county council of the duty to maintain these particular drains, since it retained to the rural district council "any functions not "being functions with respect to highways" and on the particular facts these drains were not functions with respect to highways.

In our judgment, on the true construction of section 30 (1) with its proviso the rural district council retains functions inherited from the surveyor of highways unless they are "functions with "respect to highways." The difficulty lies in deciding whether the maintenance of these or any other particular drains are "functions with respect to highways," and that point has, we are told, given rise to doubts and problems in many cases.

Mr. Scholefield traced the history of roads from early days and his careful argument may be summarised thus. From the days of Philip and Mary (2 & 3 Ph. & M. c. 8), when statutory labour was introduced and local elected surveyors of highways were made responsible, there was constant difficulty in maintaining highways. Later a rate became leviable to help the surveyor to achieve maintenance for which statutory labour was inadequate. And always, especially when the condition of the roads was elementary, water was an enemy to maintenance. It was the privilege as well as the duty of the surveyor to deal with drainage so as to enable him to prevent flooding and accumulations of water which would disintegrate the roads: see *per* Byrne J. in *Attorney-General* v. *Tamworth Rural District Council.*[1] The commissioners under the Enclosure Act, 1800, must have had that in mind, Mr. Scholefield argues, when they laid the rate in respect of these drains, not on the riparian owners, but on all the inhabitants of the parish since all were concerned in the maintenance of the highways. It is to their award, therefore, that the court should look in deciding whether the maintenance of these particular drains is "a function with respect to highways."

We cannot accede to that argument. There is no sufficient evidence that the levying of a universal rate was due to the commissioners' belief that it was by virtue of its effect on a highway that maintenance of a particular drain was a matter of concern to all. Nor do we think that the Local Government Act,

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[1] (1901) 85 L.T. 190.

1929, when it allocated functions on the appointed day, had any intention of taking century-old awards (or opinions) as the test. The question whether a function was a function with respect to "highways" must, in our judgment, have been intended to be answered as a matter of fact by a contemporary consideration of the land itself. It would be a question for the surveyor, not the historian. The judge propounded the test which he applied to the particular facts in this case as follows[2]: "There are, of "course, road drains and gullies whose main, if not whose only, "function is to drain the highway. The repair of such drains "and gullies is, in my judgment, clearly a function with respect "to highways. There are other drains and ditches whose func-"tion is solely to drain agricultural land, and which cannot in "any way affect highways. The repair of such drains and "ditches is equally clearly not a function with respect to high-"ways. Then there are drains and ditches that affect both "agricultural land and highways. Whether or not the function "of maintaining and repairing these drains and ditches can "properly be described as a function with respect to highways "depends, in my view, on the degree to which the drains can be "truly regarded as land drainage or road drainage."

It is not disputed that the decision of fact is right, if the test which the judge applied is correct. In our judgment it is correct and clear, and we do not seek to improve on it.

Applying that test it should be possible for surveyors of the bodies concerned to agree without serious difficulty what are the boundaries of their respective spheres of duty.

The appeal will be dismissed.

Appeal dismissed with costs.

Solicitors: *John J. McIntyre for Town Clerk, St. Ives; Sharpe, Pritchard & Co. for A. Case Aylward, Huntingdon; Fisher, Dowson & Wasbrough for Francis & Co., Cambridge.*

I. G. R. M.

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[2] [1960] 1 Q.B. 312, 321.

C. A.

1960
Nov. 4, 7, 8;
Dec. 15.

Sellers,
Pearce and
Devlin L.JJ.

ARCHBOLDS (FREIGHTAGE) LTD. *v.* S. SPANGLETT LTD.

RANDALL (THIRD PARTY).

[1957 A. No. 1131.]

Contract — Illegality — Contract prohibited by statute — Illegality in performance—Contract not ex facie illegal—Illegality known only to defendants—Whether plaintiffs entitled to recover for breach—Road and Rail Traffic Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 53), *ss.* 1, 2.

Road Traffic—Licence—Carriage of goods for reward—Vehicles with "A" licence required—Contract performed by vehicles with "C" licence—Defect only known to one party—Effect on claim under contract—Road and Rail Traffic Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 53), *ss.* 1, 2.

The defendants were furniture manufacturers in London and owned a number of vans with "C" licences under the Road and Rail Traffic Act, 1933,[1] which enabled them to carry their own goods, but did not allow them to carry for reward the goods of others. The plaintiffs were carriers with offices in London and Leeds, and their vehicles had "A" licences under the Act, which enabled them to carry the goods of others for reward. The plaintiffs' London office, as a result of a telephone conversation with some unidentified person from the defendants' office, believed that the defendants' vehicle had "A" licences, and employed the defendants to carry a part of a load for them on the defendants' van which was taking some of their (the defendants') furniture from London to Leeds.

The defendants' driver, having delivered those goods, spoke on the telephone to the traffic manager of the plaintiffs' office at Leeds to see if he could obtain a load for his empty van from Leeds to London, and said that he had just carried goods from the plaintiffs'

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[1] Road and Rail Traffic Act, 1933, s. 1: "(1) . . . no person shall use "a goods vehicle on a road for the "carriage of goods . . . except under "a licence. . . ."

S. 2: "(1) Licences shall be of "the following classes:—(*a*) public "carriers' licences . . . (*c*) private "carriers' licences. (2) A public "carrier's licence (in this Part of "this Act referred to as 'an A "'licence') shall entitle the holder "thereof to use the authorised "vehicles for the carriage of goods "for hire or reward . . . (4) A "private carrier's licence (in this "Part of this Act referred to as 'a "'C licence') shall entitle the holder "thereof to use the authorised "vehicles for the carriage of goods "for or in connection with any trade "or business carried on by him, "subject to the condition that no "vehicle which is for the time being "an authorised vehicle shall be used "for the carriage of goods for hire "or reward."

S. 9: "(1) . . . any person who "fails to comply with any condition "of a licence held by him, shall be "guilty of an offence under this Part "of this Act."

London office to Leeds. The traffic manager replied that he had a load, which was in fact 200 cases of whisky, but he made no inquiries from the driver as to whether he had an "A" licence. The defendants' van was duly loaded with the whisky, which was stolen on the way to the London docks owing to the driver's negligence.

On a claim by the plaintiffs for damages for the loss of the whisky, the defendants pleaded the illegality of the contract, in that their van did not have an "A" licence as required by the Act of 1933:—

Held, (1) that there was no justification for any finding that the plaintiffs knew or should have known that the defendants' van had only a "C" licence (post, p. 383).

(2) That the plaintiffs could not assert a right of action without relying on the contract (post, p. 384).

(3) That the contract was not expressly forbidden by statute (post, pp. 385, 388, 389).

In re Mahmoud and Ispahani [1921] 1 K.B. 716; 37 T.L.R. 489 and *J. Dennis & Co. Ltd.* v. *Munn* [1949] 2 K.B. 327; 65 T.L.R. 251; [1949] 1 All E.R. 616, C.A. distinguished.

(4) That the contract was not prohibited by implication under the Act, since loading the van by the plaintiffs did not constitute a "use" of the vehicle within the meaning of section 1 of the Road and Rail Traffic Act, 1933, nor were they aiding or abetting the defendants' illegal act, since they were unaware of the true facts (post, pp. 385, 388, 390).

St. John Shipping Corporation v. *Joseph Rank Ltd.* [1957] 1 Q.B. 267; [1957] 3 W.L.R. 870; [1956] 3 All E.R. 683 applied.

(5) That the contract was not ex facie illegal, and public policy did not constrain the court to refuse aid to the plaintiffs, who did not know that the contract would be performed illegally (post, p. 388).

Dictum of Lord Wright in *Vita Food Products Inc.* v. *Unus Shipping Co. Ltd.* [1939] A.C. 277, 293; 55 T.L.R. 402; [1939] 1 All E.R. 513, P.C. applied.

Per Devlin L.J. The fact that it may be known to one of the parties at the time of making the contract that he cannot perform it legally, and therefore that it will inevitably be broken, does not make the contract itself illegal (post, p. 392).

Decision of Slade J. affirmed.

APPEAL from Slade J.

The following statement of facts is taken from the judgment of Pearce L.J. Judgment was given for the plaintiffs, Archbolds (Freightage) Ltd., on December 3, 1959, for £3,674 18s. 3d. damages in respect of the loss of a consignment of whisky which was stolen from the defendants, S. Spanglett Ltd., owing to their negligence, while they were transporting it as carriers for the plaintiffs from Leeds to the London docks. Various matters raised in the defence were decided in the plaintiffs' favour, and the issue on this appeal was whether the judge should have held that the plaintiffs could not recover damages because the contract of carriage was illegal.

The following facts were material to this issue: the defendants were furniture manufacturers in London and owned five vans for use in their business. Those vans had "C" licences under the Road and Rail Traffic Act, 1933, which enabled them to carry the defendants' own goods but did not allow them to carry for reward the goods of others. The plaintiffs were carriers with offices at London and Leeds and also had a clearing house to assist with sub-contracting contracts of carriage. Their vehicles had "A" licences which enabled them to carry the goods of others for reward. When some other carrier was returning home with an empty van having made a delivery, he might ask the plaintiffs if they had a load available for him; and if they had one available, it was an economy for them to sub-contract that load to him instead of sending their own van with the risk of its having to return empty.

At the time of the Suez crisis there was a shortage of petrol and the Minister enlarged the scope of "C" licences to permit licensees to carry the goods of others which would normally be carried under [other persons' own] "C" licences. This limited extension was presumably designed to leave the trade of "A" licence-holders unaffected. Although it was not strictly proved, it was assumed that the whisky in question was not whisky that would normally be carried under a "C" licence. Therefore it could not legally be carried for reward on any of the defendants' vans.

The plaintiffs' London office, as a result of a telephone conversation on March 25, 1956, with some unidentified person who spoke from the defendants' office, believed that the defendants' vehicles had "A" licences and were entitled to carry general goods. They therefore employed the defendants to carry for them a part load of goods on the defendants' van which was taking some of the defendants' own furniture from London to the Leeds area.

On March 27, 1956, Randall, the defendants' driver, having delivered those goods, spoke on the telephone to one Field, the traffic manager at the plaintiffs' office in Leeds, in order to see if he could obtain a load for his empty van back from Leeds to London. Randall said who he was, that he was from the defendants and that he had just carried goods from the plaintiffs' London office to Leeds and "if possible would like a return "load." He then said: "Have you anything for a covered "van?" Field replied that he had 3¾ tons. He left the telephone to make certain that the load was suitable for a covered van, returned to the telephone and told Randall to come to the plaintiffs' Leeds office. Field made no inquiry about Randall's licence because, to use his own words, "I knew he had been "loaded by our London office." Randall came to the office, the van was loaded with 3¾ tons, which was in fact 200 cases of whisky, and set off for the London docks. The whisky was stolen owing to Randall's negligence.

Slade J. held that the plaintiffs did not know that the contract was to be carried out in an illegal manner and that their claim for damages succeeded.

The defendants appealed.

David Karmel Q.C. and *Montague Waters* for the defendants. The short point of law is whether the transaction, in respect of which this contract was made, was prohibited by statute and thus illegal. Illegality of the contract is the only point. This contract was made in respect of one particular van—namely, Randall's covered van, which had only a "C" licence—and no other, and it was accordingly a contract for carriage for reward which was absolutely prohibited by statute: Road and Rail Traffic Act, 1933, ss. 1 and 2. The judge was wrong in holding that the contract was a general one which could be performed in any way the defendants chose.

Since this was a contract forbidden by statute, it was unenforceable by the plaintiffs: *In re an Arbitration between Mahmoud and Ispahani.*[2] It necessarily involved the commission of an illegality, as it could only be carried out in Randall's van, and was therefore void: *Nash* v. *Stevenson Transport Ltd.*[3] and *J. Dennis & Co. Ltd.* v. *Munn.*[4]

On the evidence it is clear that the plaintiffs could have easily discovered that this van was a furniture van, possessing only a "C" licence, and it was their negligence in failing to make any sort of inquiry which led to the mistake. But even assuming (as the judge held) that they were not negligent by that omission, they cannot recover because the contract could only be carried

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[2] [1921] 1 K.B. 716; 37 T.L.R. 489.

[3] [1936] 2 K.B. 128; 52 T.L.R. 331.

[4] [1949] 2 K.B. 327; 65 T.L.R. 251; [1949] 1 All E.R. 616, C.A.

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out by this particular vehicle, it could not be performed in a legal manner and was therefore void.

Alternatively, if this was not a contract to carry in this particular vehicle, then it was a contract which Randall had no authority to make on behalf of the defendants.

Waters following. The judge was wrong in saying that this contract could have been carried out lawfully. It is implicit in the judgment that the moment when the contract was completed was when the documents were handed to the driver after the goods had been loaded, and it was, therefore, a contract which had to be performed in this vehicle: *Davies* v. *Collins*[5] and *Edwards* v. *Newland & Co.* (*E. Burchett Ltd., Third Party*).[6] The contract involved not only the carriage but the safe custody of the goods.

J. C. Leonard and *H. K. Woolf* for the plaintiffs. If an ordinary road haulage contract has to be performed by a particular vehicle, then the plaintiffs would lose this case. This was a type of contract which could be vicariously performed: *Davies* v. *Collins*[7]; *Edwards* v. *Newland.*[8] The contract of carriage in itself was not illegal; it was only the defendants' method of performance of it which was illegal, but that should not prevent the plaintiffs, who were unaware of the illegality, from recovering: *St. John Shipping Corporation* v. *Joseph Rank Ltd.*[9] If the defendants did not have a valid licence in force for this vehicle, then the only offence which the plaintiffs could have committed would have been aiding and abetting.

[SELLERS L.J. If I know your vehicle has only a "C" licence and cannot lawfully take my goods, am I not "using" your vehicle?]

No, only aiding and abetting.

In *Davies, Turner & Co. Ltd.* v. *Brodie*[10] the contract itself was not illegal, and the plaintiffs, who had acted in good faith and taken reasonable precautions, were held not to have aided and abetted the illegal performance. That case, which distinguished *Carter* v. *Mace*[11] as being a decision on its own facts, is applicable here. Even on the basis that the contract was itself illegal, the plaintiffs were completely innocent unless they had such knowledge of the true facts that they could be said to be aiding and abetting.

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[5] (1945) 61 T.L.R. 218; [1945] 1 All E.R. 247, C.A.

[6] [1950] 2 K.B. 534; 66 T.L.R. (Pt. 2) 321; [1950] 1 All E.R. 1072, C.A.

[7] 61 T.L.R. 218.

[8] [1950] 2 K.B. 534.

[9] [1957] 1 Q.B. 267; [1956] 3 W.L.R. 870; [1956] 3 All E.R. 683.

[10] [1954] 1 W.L.R. 1364; [1954] 3 All E.R. 283, D.C.

[11] [1949] 2 All E.R. 714, D.C.

[Sellers L.J. The plaintiffs could have looked up the defendants to see whether they were "A" or "C" carriers.]

The judge held that the plaintiffs were subject to the most wilful deception. That is a most important aspect of this matter. The effect of taking a load from London to Leeds had the effect of putting the defendants amongst the plaintiffs' accepted customers.

It is contended: (1) The plaintiffs were innocent of any complicity in the infringement of any part of the law by the defendants. (2) The statute should not be construed as prohibiting contracts in any way but only as prohibiting the user of unlicensed vehicles contrary to the terms of the statute. (3) That being so, this case is entirely different from cases like building contracts. (4) This was a plain contract of carriage and not a contract which had to be performed in one vehicle, and therefore the judge was right in holding that the only illegality arose in the mode of its performance. The first three contentions are all based on his judgment.

Alternatively, if the court finds that the contract is illegal, nevertheless the plaintiffs are entitled to succeed on the ground of negligence. Even if they cannot rely on the contract they can plead that the defendants came into possession of the goods under a void contract, that the plaintiffs were entitled to recover their goods but that before they were able to do so they were lost by the defendants' negligence. The plaintiffs, therefore, are entitled to damages for breach of the defendants' duty to take care, such duty not being lower than that of voluntary bailees. Although the defendants were in possession of these goods with the plaintiffs' consent, there was no bargain between them which excused the defendants from their liability to exercise that reasonable care which a gratuitous bailee owed towards somebody else's goods which were in his possession. It is immaterial that the possession was under an illegal contract, and although the court will not enforce that contract it does not forbid the plaintiffs from referring to it. The defendants are therefore liable in negligence or conversion for breach of their duty to take reasonable care: *The Winkfield*[12]; *Bowmakers Ltd.* v. *Barnet Instruments Ltd.*[13];

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[12] [1902] P. 42; 18 T.L.R. 178, C.A.

[13] [1945] K.B. 65; 61 T.L.R. 62; [1944] 2 All E.R. 579.

Singh v. *Ali.*[14] [*Kiriri Cotton Co. Ltd.* v. *Dewani*[15] and *Strongman* v. *Sincock*[16] were also referred to.]

Karmel Q.C. in reply. In *St. John Shipping Corporation* v. *Joseph Rank Ltd.*[17] the facts were entirely different from this case. This was illegal not because the contract as such was illegal but because the whole transaction here was illegal. The position was considered in *Vinall* v. *Howard.*[18] One of the fallacies in the plaintiffs' argument was that the contract was not prohibited by statute; that is not denied; but that is not to say that this whole operation was not illegal: see Halsbury's Laws of England, 3rd ed., vol. 8, p. 140; *Waugh* v. *Morris.*[19]

This contract could only be carried out unlawfully and its performance was expressly forbidden by statute; the observations of Lord Roche in *Nash* v. *Stevenson*[20] are relied on. Whether or not both parties knew of it, the act to be performed was illegal. It was said that if the defendants refused to carry this load and were sued for damages for breach of contract, they could not plead the illegality of the contract, but on the authority of *Commercial Air Hire Ltd.* v. *Wrightways Ltd.*[21] the court could itself have taken the point.

On the evidence the judge should have come to the conclusion that the plaintiffs ought to be deemed to have knowledge that the defendants' van was a furniture van possessing only a "C" licence. It is wholly unrealistic that the plaintiffs should be considered innocent in the circumstances; they could not be said to be acting with any sort of diligence in not making any inquiry. What happened in London was irrelevant.

This case is based fairly and squarely on the contract, although it was also said by the plaintiffs that the defendants were guilty of negligence or conversion. For an elementary definition of the duty to take care, see Halsbury, vol. 28, p. 7. That argument is not maintainable; the duty in this case arose purely and simply from the parties' relationship under the contract.

Cur. adv. vult.

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[14] [1960] A.C. 167; [1960] 2 W.L.R. 180, P.C.

[15] [1960] A.C. 192; [1960] 2 W.L.R. 127; [1960] 1 All E.R. 177, P.C.

[16] [1955] 2 Q.B. 525; [1955] 3 W.L.R. 360; [1955] 3 All E.R. 90, C.A.

[17] [1957] 1 Q.B. 267.

[18] [1954] 1 Q.B. 375; [1954] 2 W.L.R. 314; [1954] 1 All E.R. 458, C.A.

[19] (1873) L.R. 8 Q.B. 202, 208.

[20] [1936] 2 K.B. 128.

[21] [1938] 1 All E.R. 89.

December 15, 1960. Sellers L.J. When the argument on this appeal was concluded I was inclined to view the facts differently from those accepted by Slade J., who tried the case.

[His Lordship stated an alternative view of the facts from that set out above, and continued:] However, I feel no regret in the circumstances of this case that both my brethren, whose judgments I have had the advantage of reading, are in accord with Slade J., at least to the extent that the plaintiffs did not know that the vehicle on which the goods were placed for carriage held only a "C" licence, nor did they deliberately shut their eyes to the matter. There are, therefore, concurrent findings of fact with which I do not feel justified in disagreeing, and that leaves the case open for argument.

The facts which the court accepts are those stated by Pearce L.J., and on those facts I am in agreement with the views of my brethren that the contract so entered into was not prohibited by statute and was not ex facie illegal, and I do not wish to add to the reason and authority by which my brethren conclude this case in favour of the plaintiffs.

I would dismiss the appeal.

Pearce L.J. stated the facts substantially as above set out and continued: On the issue of illegality the judge said this: "This case is one which falls within the class of case where the "contract is not ab initio illegal, or, indeed, illegal at all vis-à-vis "the plaintiffs in this action. In the contract of carriage, no "stipulation was made as to what form the carriage should take. "It was open to the defendants to carry the goods in any vehicle "they liked so far as the plaintiffs were concerned. It is, of "course, true that Field would contemplate that, as it was a "return load, it would in fact be taken back by Randall in the "vehicle in which he brought the goods to Leeds on the outward "journey, but Field never even saw the vehicle. As I have said, "no one whose knowledge could possibly be imputed to these "plaintiffs ever did see the vehicle, and I have already found as a "fact that they did not know that the vehicle in which Randall "intended to take the goods to the Royal Albert Docks had in "fact only a 'C' licence. In so far, therefore, as it is a "question of fact, and in so far as it is a question of law, I hold "as a matter of law that this contract was not of itself illegal, "and that any illegality arose only in the method of its performance by the defendant company. I therefore find that the plea "of illegality fails."

Mr. Karmel, in a concise and powerful argument, contended that the judge should have found as a fact that the plaintiffs knew, or that they ought to have known, that the defendants' van had only a "C" licence and, therefore, could not legally carry the whisky. He also argues that even assuming that the plaintiffs were imposed on (as the judge found), and did not know of the "C" licence and were not negligent in failing to find out, yet the plaintiffs must fail because the contract of carriage was in fact unlawful, since it was a contract for carriage in that particular van (Randall's van) which could not be performed legally. The judge is in error, he contends, in saying: "It was "open to the defendants to carry the goods in any vehicle they "liked so far as the plaintiffs were concerned."

On the question of the plaintiffs' knowledge, the matters which were urged before us were urged before the trial judge, but he heard the witnesses and he decided otherwise. He said: "What "is clear is that the most wilful piece of deception was practised "upon Archbolds, London, by the defendants to persuade them "to be allowed to carry this load, and to carry this load, as I now "know it was carried, on a 'C' licence vehicle. That is material "only to the issue of illegality which is raised on the pleadings "in this case."

Later the judge said: "As to the words 'as the plaintiffs well "'knew,' I asked Mr. Waters, and he conceded that there was "no evidence at all that the plaintiffs well knew, and I find as a "fact that the plaintiffs did not know. I think the high-water "mark of what can be imputed to the plaintiffs or any servant "of theirs—and of this there is no evidence—is that during the "loading of the cases of whisky at Archbolds' Leeds warehouse, "somewhere about a mile or some distance away from their "offices, there was the vehicle as large as life, stamped all over "as what I may call a furniture van, and anyone who had taken "the trouble to look would have seen a "C" licence on its "windscreen. There is no evidence that anyone did look or that "the people whose sole task, having been instructed by their "foreman, who authorised the loading, was to load the cases on "to the lorry, directed their minds for one moment to the question of whether it was a 'C' licence vehicle or a furniture van "or a Carter Paterson van, or anything of the kind. As I say, "I find as a fact that the plaintiffs did not know."

Again he says: "No one whose knowledge could possibly be "imputed to these plaintiffs ever did see the vehicle, and I have "already found as a fact that they did not know that the vehicle "in which Randall intended to take the goods to the Royal Albert "Docks had in fact only a 'C' licence." He also held that any suggestion that Field ought to have inquired what licence was held by Randall's vehicle was completely answered by the fact that Field knew that Randall had made the journey to Leeds with a load put on the lorry by the plaintiffs' London office.

The judge dealt very fully and carefully with the evidence, he heard the witnesses and he came to conclusions on their credibility. It is in just such a case as this, cases that turn on bona fides and knowledge and half-knowledge, that the trial judge has so great an advantage over a court that relies on the colourless, impersonal and sometimes misleading transcript. There were cogent arguments based on cross-examination of the witnesses that the plaintiffs must have known or suspected the true facts about the licence of Randall's vehicle, but in spite of them he came to the conclusion that the plaintiffs were imposed upon and did not know, and he acquitted them of any bad faith in the matter. I am not prepared to disturb that finding. In so many cases of deception it is hard even for the persons deceived to imagine in retrospect how they could have made such a mistake, yet the fact remains that people are misled into foolish errors. In my judgment, we should not be justified in making any finding that the plaintiffs knew or that they should have known that Randall's van had only a "C" licence.

It having been proved, therefore, that the plaintiffs were imposed on and believed that the goods could be lawfully carried on Randall's van, are they disentitled to sue?

Mr. Karmel argues that the goods had to be carried in Randall's van alone and no other, and that the judge was wrong in holding that this contract of carriage was a general one to be performed by the defendants in any way that they might choose. Mr. Leonard argues, on the other hand, that this contract, like many others, was made with a particular method of performance in mind, but was not restricted to that particular method of performance, and that haulage contracts are not so personal to the carrier that they cannot be vicariously performed. The point is not easy. I incline to the view held by the judge, but I do not find it necessary to express a concluded view on it.

Let us assume (although I am far from satisfied on this point) that the judge was in error in holding that the haulage contract could have been performed by the defendants in any way they liked (that is to say, lawfully as well as unlawfully). Let us assume first that it was a contract for carriage in Randall's van only and, secondly, that it was not by the nature of the contract one which could be performed vicariously. It must then inevitably be carried out unlawfully if (but only if) one adds the fact that Randall's van had a "C" licence and therefore could not lawfully carry the goods in question. But that fact, though known to the defendants, was unknown to the plaintiffs.

This is not a case where the plaintiffs can assert a cause of action without relying on the contract. Mr. Leonard put forward an ingenious alternative argument based on the plaintiffs' rights against the defendants as voluntary bailees of the plaintiffs' property: see *Bowmakers Ltd.* v. *Barnet Instruments Ltd.*,[1] so that he might claim in negligence or conversion without having any recourse to the contract or exposing to the court as part of his cause of action its alleged illegality. But I do not think that he can make good that argument. His cause of action comes from the contract, and if the contract is such that the court must refuse its aid, the plaintiffs cannot recover their damages.

If a contract is expressly or by necessary implication forbidden by statute, or if it is ex facie illegal, or if both parties know that though ex facie legal it can only be performed by illegality or is intended to be performed illegally, the law will not help the plaintiffs in any way that is a direct or indirect enforcement of rights under the contract. And for this purpose both parties are presumed to know the law.

The first question, therefore, is whether this contract of carriage was forbidden by statute. The two cases on which the defendants mainly rely are *In re an Arbitration between Mahmoud and Ispahani*[2] and *J. Dennis & Co. Ltd.* v. *Munn*.[3] In both those cases the plaintiffs were unable to enforce their rights under contracts forbidden by statute. In the former case the statutory order said[4]: "a person shall not . . . buy or sell . . . [certain] "articles . . . except under and in accordance with the terms of "a licence." In the latter case the statutory regulation provided[5]: "subject to the provisions of this regulation . . . the "execution . . . of any operation specified . . . shall be unlawful "except in so far as authorised." In neither case could the plaintiff bring his contract within the exception that alone would have made its subject-matter lawful, namely, by showing the existence of a licence. Therefore, the core of both contracts was the mischief expressly forbidden by the statutory order and the statutory regulation respectively.

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[1] [1945] K.B. 65; 61 T.L.R. 62; [1944] 2 All E.R. 579.

[2] [1921] 2 K.B. 716; 37 T.L.R. 489.

[3] [1949] 2 K.B. 327; 65 T.L.R. 251; [1949] 1 All E.R. 616, C.A.

[4] [1921] 2 K.B. 716.

[5] [1949] 2 K.B. 327, 329.

In *Mahmoud's* case [6] the object of the order was to prevent (except under licence) a person buying and a person selling, and both parties were liable to penalties. A contract of sale between those persons was therefore expressly forbidden. In *Dennis's* case [7] the object of the regulation was to prevent (except under licence) owners from performing building operations, and builders from carrying out the work for them. Both parties were liable to penalties and a contract between these persons for carrying out an unlawful operation would be forbidden by implication.

The case before us is somewhat different. The carriage of the plaintiffs' whisky was not as such prohibited; the statute merely regulated the means by which carriers should carry goods. Therefore this contract was not expressly forbidden by the statute.

Was it then forbidden by implication? The Road and Rail Traffic Act, 1933, section 1, says: "no person shall use a goods "vehicle on a road for the carriage of goods . . . except under "licence," and provides that such use shall be an offence. Did the statute thereby intend to forbid by implication all contracts whose performance must on all the facts (whether known or not) result in a contravention of that section?

The plaintiffs' part of the contract could not constitute an illegal use of the vehicle by them since they were not "using" the vehicle. If they were aware of the true facts they would, of course, be guilty of aiding and abetting the defendants, but if they acted in good faith they would not be guilty of any offence under the statute: see *Davies, Turner & Co. Ltd.* v. *Brodie* [8] and *Carter* v. *Mace*.[9] In this case, therefore, the plaintiffs were not committing any offence.

In *St. John Shipping Corporation* v. *Rank* [10] Devlin J. held that the plaintiffs were entitled to recover although there had been an infringement of a statute in the performance of a contract, but in that case the contract was legal when made. Though not directly applicable to the present case, it contains an observation (with which I entirely agree) on the point which arises here. He said [11]: "For example, a person is forbidden by statute "from using an unlicensed vehicle on the highway. If one asks "oneself whether there is in such an enactment an implied

[6] [1921] 2 K.B. 716.

[7] [1949] 2 K.B. 327.

[8] [1954] 1 W.L.R. 1364; [1954] 3 All E.R. 283, D.C.

[9] [1949] 2 All E.R. 714, D.C.

[10] [1957] 1 Q.B. 267; [1956] 3 W.L.R. 870; [1956] 3 All E.R. 683.

[11] [1957] 1 Q.B. 267, 287.

"prohibition of all contracts for the use of unlicensed vehicles, "the answer may well be that there is, and that contracts of "hire would be unenforceable. But if one asks oneself whether "there is an implied prohibition of contracts for the carriage of "goods by unlicensed vehicles or for the repairing of unlicensed "vehicles or for the garaging of unlicensed vehicles, the answer "may well be different. The answer might be that collateral "contracts of this sort are not within the ambit of the statute." In my judgment that distinction is valid.

The object of the Road and Rail Traffic Act, 1933, was not (in this connection) to interfere with the owner of goods or his facilities for transport, but to control those who provided the transport, with a view to promoting its efficiency. Transport of goods was not made illegal but the various licence holders were prohibited from encroaching on one another's territory, the intention of the Act being to provide an orderly and comprehensive service. Penalties were provided for those licence holders who went outside the bounds of their allotted spheres. These penalties apply to those using the vehicle but not to the goods owner. Though the latter could be convicted of aiding and abetting any breach, the restrictions were not aimed at him. Thus a contract of carriage was, in the sense used by Devlin J., "collateral," and it was not impliedly forbidden by the statute.

This view is supported by common sense and convenience. If the other view were held it would have far-reaching effects. For instance, if a carrier induces me (who am in fact ignorant of any illegality) to entrust goods to him and negligently destroys them, he would only have to show that (though unknown to me) his licence had expired, or did not properly cover the transportation, or that he was uninsured, and I should then be without a remedy against him. Or, again, if I ride in a taxicab and the driver leaves me stranded in some deserted spot, he would only have to show that he was (though unknown to me) unlicensed or uninsured, and I should be without remedy. This appears to me an undesirable extension of the implications of a statute.

Lord Wright said in *Vita Food Products Inc.* v. *Unus Shipping Co. Ltd.*[12]: "Each case has to be considered on its merits. Nor "must it be forgotten that the rule by which contracts not expressly forbidden by statute or declared to be void are in proper cases "nullified for disobedience to a statute is a rule of public policy "only, and public policy understood in a wider sense may at

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[12] [1939] A.C. 277, 293; 55 T.L.R. 402; [1939] 1 All E.R. 513.

"times be better served by refusing to nullify a bargain save on "serious and sufficient grounds." If the court too readily implies that a contract is forbidden by statute, it takes it out of its own power (so far as that contract is concerned) to discriminate between guilt and innocence. But if the court makes no such implication, it still leaves itself with the general power, based on public policy, to hold those contracts unenforceable which are ex facie unlawful, and also to refuse its aid to guilty parties in respect of contracts which to the knowledge of both can only be performed by a contravention of the statute: see *Nash* v. *Stevenson Transport Ltd.*,[13] or which though apparently lawful are intended to be performed illegally or for an illegal purpose, for example, *Pearce* v. *Brooks*.[14]

It is for the defendants to show that contracts by the owner for the carriage of goods are within the ambit of the implied prohibition of the Road and Rail Traffic Act, 1933. In my judgment they have not done so.

The next question is whether this contract though not forbidden by statute was ex facie illegal. Must any reasonable person on hearing the terms of the contract (which presumed knowledge of the law) realise that it was illegal? There is nothing illegal in its terms. Further knowledge, namely, knowledge of the fact that Randall's van was not properly licensed, would show that it could only be performed by contravention of the statute, but that does not make the contract ex facie illegal.

However, if both parties had that knowledge the contract would be unenforceable as being a contract which to their knowledge could not be carried out without a violation of the law: see *per* Lord Blackburn in *Waugh* v. *Morris*.[15] But where one party is ignorant of the fact that will make the performance illegal, is it established that the innocent party cannot obtain relief against the guilty party? The case has been argued with skill and care on both sides, and yet no case has been cited to us establishing the proposition that where a contract is on the face of it legal and is not forbidden by statute, but must in fact produce illegality by reason of a circumstance known to one party only, it should be held illegal so as to debar the innocent party from relief. In the absence of such a case I do not feel compelled to so unsatisfactory a conclusion, which would injure the innocent, benefit the guilty, and put a premium on deceit.

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[13] [1936] 2 K.B. 128; 52 T.L.R. 331.

[14] (1866) L.R. 1 Ex. 213.

[15] (1873) L.R. 8 Q.B. 202, 208.

Such a conclusion (in cases like this where a contract is not forbidden by statute) can only derive from public policy. For the reasons given by Lord Wright above, an extension of the law in this direction would be more harmful than beneficial. No question of moral turpitude arises here. The alleged illegality is, so far as the plaintiffs were concerned, the permitting of their goods to be carried by the wrong carrier, namely, a carrier who unknown to them was not allowed by his licence to carry that particular class of goods. The plaintiffs were never in delicto since they did not know the vital fact that would make the performance of the contract illegal.

In my view, therefore, public policy does not constrain us to refuse our aid to the plaintiffs and they are therefore entitled to succeed. I would dismiss the appeal.

Devlin L.J. The effect of illegality upon a contract may be threefold. If at the time of making the contract there is an intent to perform it in an unlawful way, the contract, although it remains alive, is unenforceable at the suit of the party having that intent; if the intent is held in common, it is not enforceable at all. Another effect of illegality is to prevent a plaintiff from recovering under a contract if in order to prove his rights under it he has to rely upon his own illegal act; he may not do that even though he can show that at the time of making the contract he had no intent to break the law and that at the time of performance he did not know that what he was doing was illegal. The third effect of illegality is to avoid the contract ab initio and that arises if the making of the contract is expressly or impliedly prohibited by statute or is otherwise contrary to public policy.

The defendants do not seek to bring this case under either of the first two heads. They cannot themselves enforce the contract because they intended to perform it unlawfully with a van that they knew was not properly licensed for the purpose: but that does not prevent the plaintiffs, who had no such intent and were not privy to it, from enforcing the contract. Nor can it be said that the plaintiffs committed any illegal act. To load a vehicle is not to use it on the road, which is what is forbidden; no doubt loading would be enough to constitute aiding and abetting if the plaintiffs knew of the defendants' purpose (*National Coal Board* v. *Gamble*[16]), but they did not.

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[16] [1959] 1 Q.B. 11; [1958] 3 W.L.R. 434; [1958] 3 All E.R. 203, D.C.

So what the defendants say is that the contract is prohibited by the Road and Rail Traffic Act, 1933, s. 1. In order to see whether the contract falls within the prohibition it is necessary to ascertain the exact terms of the contract and the exact terms of the prohibition. For reasons which I shall explain later, I shall begin by ascertaining the latter. Section 1 of the Act provides that no person shall use a goods vehicle on a road for the carriage of goods for hire or reward except under a licence. Section 2 provides for various classes of licences, "A," "B" and "C." It is agreed that the carriage of the goods which were the subject-matter of this contract required an "A" licence. The fact that the van had a "C" licence does not therefore help one way or the other; and it is admitted that the defendants' use of this van for the carriage of these goods was prohibited. As I have noted, the plaintiffs are not to be treated as using the van because they supplied the load. Section 1 (3) provides that the driver of the vehicle or, if he is an agent or servant, his principal, shall be deemed to be the person by whom the vehicle is being used.

The statute does not expressly prohibit the making of any contract. The question is therefore whether a prohibition arises as a matter of necessary implication. It follows from the decision of this court in *Nash* v. *Stevenson Transport Ltd.*[17] that a contract for the use of unlicensed vehicles is prohibited. In that case the plaintiff held "A" licences which the defendant wanted to purchase. But the Act of 1933 provides that licences may not be transferred or assigned, and it was therefore agreed that the defendant should run the vehicles in the plaintiff's name so that they might obtain the benefit of his licences. It was held by the court that that was an illegal agreement because the defendant was the person who was using the vehicles and the plaintiff the person who was licensed to use them; thus the user was not the licensee. In the present case there was no contract for the use of the vehicle.

On the other hand, it does not follow that because it is an offence for one party to enter into a contract, the contract itself is void. In *In re Mahmoud and Ispahani*[18] Scrutton L.J. said: "In "*Bloxsome* v. *Williams*[19] the position was that the defendant, a "horse dealer, was prohibited from trading on Sunday, but "there was nothing illegal in another person making a contract

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[17] [1936] 2 K.B. 128; 52 T.L.R. 331; [1936] 1 All E.R. 906, C.A.

[18] [1921] 2 K.B. 716, 730.

[19] (1824) 3 B. & C. 232.

"with a horse dealer, except that if he knew that the person "with whom he was dealing was a horse dealer and was guilty "of breaking the law he might be aiding and abetting him to "break the law. But merely to make a contract with a horse "dealer, without knowing he was a horse dealer, was not "illegal."

The general considerations which arise on this question were examined at length in *St. John Shipping Corporation* v. *Joseph Rank Ltd.*[20] and Pearce L.J. has set them out so clearly in his judgment in this case that I need add little to them. Fundamentally they are the same as those that arise on the construction of every statute; one must have regard to the language used and to the scope and purpose of the statute. I think that the purpose of this statute is sufficiently served by the penalties prescribed for the offender; the avoidance of the contract would cause grave inconvenience and injury to innocent members of the public without furthering the object of the statute. Moreover, the value of the relief given to the wrongdoer if he could escape what would otherwise have been his legal obligation might, as it would in this case, greatly outweigh the punishment that could be imposed upon him, and thus undo the penal effect of the statute.

I conclude, therefore, that this contract was not illegal for the reason that the statute does not prohibit the making of a contract for the carriage of goods in unlicensed vehicles and this contract belongs to this class. I am able, therefore, to arrive at my judgment without an examination of the exact terms of the contract. It would have been natural to have begun by looking at the contract; I have not done so because it is doubtful whether the state of the pleadings permits a thorough examination. But as Mr. Karmel's argument before us turned upon its terms, I think that I should deal with them.

The defendants contend that this was a contract of carriage by a specified vehicle, namely, the van SXY902 then being driven by Randall. The plaintiffs agree that it was contemplated that the van SXY902 should be used for the contract but dispute that the contract was so limited. The words used in the contract were "a covered van" and the plaintiffs submit, and the judge has so held, that "it was open to the defendants to carry "the goods in any vehicle they liked."

I have reached no final conclusion on this point. Assuming, as for the purposes of this argument I do, that the statute prohibits every contract for the carriage of goods in an unlicensed vehicle, I do not think that the question whether this contract falls within the statute depends on whether it was limited to the use of the vehicle SXY902. According to the defendants' argument, the significance of the point lies in the fact that they have to accept the burden of proving that there was no way in which they could have performed the contract legally. If only the one van could have been used under the contract, they claim to have discharged that burden; otherwise they concede that they cannot prove that they could not, if they had tried, have got hold of some other licensed van. In my judgment, this is not the decisive test.

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[20] [1957] 1 Q.B. 267, 285.

It is a familiar principle of law that if a contract can be performed in one of two ways, that is, legally or illegally, it is not an illegal contract, though it may be unenforceable at the suit of a party who chooses to perform it illegally. That statement of the law is meaningful if the contract is one which is by its terms open to two modes of performance; otherwise it is meaningless. Almost any contract—certainly any contract for the carriage of goods by road—can be performed illegally; any contract of carriage by road can be performed illegally simply by exceeding the appropriate speed limit. The error in the defendants' argument, I think, is that they are looking at the facts which determine their capacity to perform and not at the terms of the contract. Suppose that the contract were for a vehicle with an "A" licence, or—what is substantially the same thing—for a specified vehicle warranted as holding an "A" licence. That would not be an illegal contract for it would be a contract for the use of a licensed vehicle and not an unlicensed one. If those were the express terms of the contract, it would not be made illegal because all the carrier's vehicles, or the specified vehicle as the case might be, had "C" licences. The most that that could show would be that the carrier might well be unable to perform his contract. Or suppose that the contract were for any "A" vehicle owned by the defendant and the defendant had a fleet of five "A" vehicles and five "C" vehicles. That would be a legal contract and it would not be made illegal because, at the time when it was made, it was physically impossible for the defendant to get any of his "A" vehicles to the loading place in time. If the contract is for a specified vehicle with an "A" licence, loading to begin within a week, it is not illegal because when the contract was made the

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vehicle had no "A" licence; one might be obtained in time and the court will not decide the question of legality by inquiring whether an "A" licence could or could not have been obtained for it within the week. So in this case it is irrelevant to say that the van SXY902 had in fact not got an "A" licence and could not conceivably have got one in time. The error in the defendants' argument is that they assume that because the parties were contracting about a specified vehicle and because that specified vehicle had in fact (a fact known to one party and not to the other) only a "C" licence, therefore they were contracting about a vehicle with a "C" licence. It is the terms of the contract that matter; the surrounding facts are irrelevant, save in so far as, being known to both parties, they throw light on the meaning and effect of the contract. The question is not whether the vehicle was in fact properly licensed but whether it was expressly or by implication in the contract described or warranted as properly licensed. If it was so described or warranted, then the legal position is, not that the contract could only be performed by a violation of the law, but that unless it could be performed legally, it could not be performed at all. The fact that, as in this case, it may be known to one of the parties at the time of making the contract that he cannot perform it legally and therefore that it will inevitably be broken, does not make the contract itself illegal.

So the correct line of inquiry into the terms of the contract in this case should have been not as to whether it provided for performance by a specified vehicle or by any vehicle that the defendants chose to nominate, but as to whether the defendants warranted or agreed that the vehicle which was to do the work, whether a specified vehicle or any other, was legally fit for the service which it had to undertake, that is, that it had an "A" licence.

I think there is much to be said for the argument that in a case of this sort there is, unless the circumstances exclude it, an implied warranty that the van is properly licensed for the service for which it is required. It would be unreasonable to expect a man when he is getting into a taxicab to ask for an express warranty from the driver that his cab was licensed; the answer, if it took any intelligible form at all, would be to the effect that it would not be on the streets if it were not. The same applies to a person who delivers goods for carriage by a particular vehicle; he cannot be expected to examine the road licence to see if it is in order. But the issue of warranty was not raised in the pleadings or at the trial and so I think it is preferable to decide this case on the broad ground which Pearce L.J. has adopted and with which, for the reasons I have given, I agree.

There are many pitfalls in this branch of the law. If, for example, Mr. Field had observed that the van had a "C" licence and said nothing, he might be said to have accepted a mode of performance different from that contracted for and so varied the contract and turned it into an illegal one: see *St. John Shipping Corporation* v. *Joseph Rank Ltd.*[21] where that sort of point was considered. Or, to take another example, if a statute prohibits the sale of goods to an alien, a warranty by the buyer that he is not an alien will not save the contract. That is because the terms of the prohibition expressly forbid a sale to an alien; consequently, the question to be asked in order to see whether the contract comes within the prohibition is whether the buyer is in fact an alien, not whether he represented himself as one. *In re Mahmoud*[22] is that sort of case. The statute forbade the buying and selling of certain goods between unlicensed persons. The buyer falsely represented himself as having a licence. It is not said that he so warranted but, if he had, it could have made no difference. Once the fact was established that he was an unlicensed person the contract was brought within the category of those that were prohibited. *Strongman* v. *Sincock*[23] exemplifies another sort of difficulty. It was an action brought by a builder against a building owner to recover the price of building work done. The statute forbade the execution of building operations without a licence. The building owner expressly undertook to obtain the necessary licence and failed to do so; and it was held that the builder could not recover. The builder, I dare say, might have contended that, having regard to the undertaking, the contract he made was for licensed operations and therefore legal. But unfortunately he had himself performed it illegally by building without a licence and he could not recover without relying on his illegal act because he was suing for money for work done. The undertaking might make the contract legal but not the operations. All these cases are distinguishable from the present one, where the contract is not within the prohibition and the plaintiffs themselves committed no illegal act and did not aid or abet the defendants. Apart from the pleading point, it might not matter if the last two cases were not distinguishable, since the plaintiffs could obtain damages for breach of the warranty as in *Strongman* v. *Sincock*.[24]

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[21] [1957] 1 Q.B. 267, 283, 284.

[22] [1921] 2 K.B. 716.

[23] [1955] 2 Q.B. 525; [1955] 3 W.L.R. 360; [1955] 3 All E.R. 90, C.A.

Appeal dismissed with costs.

Solicitors: *Hart-Leverton & Co.; Herbert Baron & Co.*

I. G. R. M.

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[24] [1955] 2 Q.B. 525.

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Lord Parker C.J., Ashworth and Elwes JJ.

FISHER *v*. BELL.

Crime—Offensive weapon—"Offers for sale"—"Flick knife" displayed in shop window with ticket bearing description and price—Whether an offence committed—Restriction of Offensive Weapons Act, 1959 (7 & 8 *Eliz.* 2, *c.* 37), *s.* 1 (1).

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A shopkeeper displayed in his shop window a knife of the type commonly known as a "flick knife" with a ticket behind it bearing the words "Ejector knife—4s." An information was preferred against him by the police alleging that he had offered the knife for sale contrary to section 1 (1) of the Restriction of Offensive Weapons Act, 1959,[1] but the justices concluded that no offence had been committed under the section and dismissed the information. On appeal by the prosecutor:—

Held, that in the absence of any definition in the Act extending the meaning of "offer for sale," that term must be given the meaning attributed to it in the ordinary law of contract, and as thereunder the display of goods in a shop window with a price ticket attached was merely an invitation to treat and not an offer;

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[1] Restriction of Offensive Weapons Act, 1959, s. 1 (1): "Any person "who manufactures, sells or hires or "offers for sale or hire, or lends or "gives to any other person—(*a*) any "knife which has a blade which opens "automatically by hand pressure "applied to a button, spring or other "device in or attached to the handle "of the knife, sometimes known as a "'flick knife' or 'flick gun'; . . . "shall be guilty of an offence and "shall be liable on summary convic-"tion in the case of a first offence to "imprisonment for a term not ex-"ceeding three months or to a fine "not exceeding fifty pounds or to "both such imprisonment and fine, ". . ."

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for sale the acceptance of which constituted a contract, the justices had correctly concluded that no offence had been committed.

Keating v. *Horwood* (1926) 28 Cox C.C. 198, D.C. and *Wiles* v. *Maddison* [1943] W.N. 40; [1943] 1 All E.R. 315, D.C. distinguished.

Per Lord Parker C.J. At first sight it seems absurd that knives of this sort cannot be manufactured, sold, hired, lent or given, but can apparently be displayed in shop windows; but even if this is a casus omissus it is not for the court to supply the omission.

CASE STATED by Bristol justices.

On December 14, 1959, an information was preferred by Chief Inspector George Fisher, of the Bristol Constabulary, against James Charles Bell, the defendant, alleging that the defendant, on October 26, 1959, at his premises in The Arcade, Broadmead, Bristol, unlawfully did offer for sale a knife which had a blade which opened automatically by hand pressure applied to a device attached to the handle of the knife (commonly referred to as a "flick knife") contrary to section 1 of the Restriction of Offensive Weapons Act, 1959.

The justices heard the information on February 3, 1960, and found the following facts: The defendant was the occupier of a shop and premises situate at 15-16, The Arcade, Broadmead, at which premises he carried on business as a retail shopkeeper trading under the name of Bell's Music Shop. At 3.15 p.m. on October 26, 1959, Police Constable John Kingston saw displayed in the window of the shop amongst other articles a knife, behind which was a ticket upon which the words "Ejector "knife—4s." were printed. The words referred to the knife in question. The police constable entered the shop, saw the defendant, and said he had reason to believe it was a flick knife displayed in the shop window. He asked if he might examine the knife. The defendant removed the knife from the window and said he had had other policemen in there about the knives. The constable examined the knife and pursuant to the invitation of the defendant took it away from the premises for examination by a superintendent of police. Later the same day he returned to the defendant's premises and informed him that in his opinion the knife was a flick knife. The defendant said "Why do manufacturers still bring them round for us to sell?" The constable informed the defendant that he would be reported for offering for sale a flick knife and the defendant replied "Fair "enough."

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It was contended by the prosecutor that the defendant by his actions in displaying the knife in the window with the ticket behind it and referring to it, such actions being carried out with the object of attracting the attention of a buyer of such knife and selling the same to such buyer, had on the day in question offered the knife for sale within the meaning of the Restriction of Offensive Weapons Act, 1959.

It was contended by the defendant that on the facts he at no time offered the knife for sale within the meaning of the Act.

The justices were of opinion that in the absence of a definition in the Act of 1959, the words "offer for sale" ought to be construed as they were in the law of contract, so that, in this instance, the defendant's action was but an invitation to treat, and not a firm offer which needed but a customer's acceptance to make a binding contract of sale. They accordingly dismissed the information. The prosecutor appealed.

J. A. Cox for the prosecutor. The sole question is whether this knife exhibited in the shop window with the price ticket behind it was an offer for sale within the meaning of section 1 (1) of the Restriction of Offensive Weapons Act, 1959. Having regard to the context in which the words are found and the mischief at which the Act is aimed, the words "offer for sale" should be construed to cover circumstances such as the present, although it is conceded that in the ordinary law of contract the exhibition of goods in a shop window amounts to no more than an invitation to treat. Support for that submission is to be found in *Keating* v. *Horwood*,[2] where, in a prosecution under the Sale of Food Order, 1921, which prohibited the offering or exposing for sale of under-weight bread, Lord Hewart C.J. held[3] that a quantity of bread placed in a baker's motor-car and taken on a delivery round was both offered and exposed for sale. See also *Wiles* v. *Maddison*,[4] where there was a prosecution under the Meat (Maximum Retail Prices) Order, 1940. Reliance is placed on the words of Viscount Caldecote C.J.[5] to the effect that a person who put goods in his shop window to be sold at an excessive price could be convicted of making an offer at too high a price. That case also shows that for the purpose of provisions of this kind an offer can exist without its actually being communicated to the offeree. This knife in the shop window was offered for sale. It may have been a conditional offer, but if a person entered the shop and asked why it was in the window the answer must have been: It is for sale.

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[2] (1926) 28 Cox C.C. 198, D.C.

[3] Ibid. 201.

[4] [1943] 1 All E.R. 315, D.C.

[5] Ibid. 317.

[Lord Parker C.J. In *Keating* v. *Horwood*[6] two members of the court are in your favour, but this point was not argued.]

The original authority for the proposition that under the law of contract putting something in a shop window is merely an invitation to treat is the old case of *Timothy* v. *Simpson*,[7] which is cited in *Pharmaceutical Society of Great Britain* v. *Boots Cash Chemists (Southern) Ltd.*[8] The latter case is not of assistance as it turned on the provisions of an Act which was concerned solely with completed sales as opposed to offers for sale. *Phillips* v. *Dalziel*,[9] which was concerned with emergency legislation relating to the sale of footwear, turned on a statutory definition, but the facts there were similar to those in *Wiles* v. *Maddison.*[10] In both cases there was an intention to sell goods later. Had the court not had to consider a statutory definition in *Phillips* v. *Dalziel*,[11] it would not have been surprising if it had decided that the transaction in that case had reached the stage reached in *Wiles* v. *Maddison.*[12] Once the legislature embarks on a definition the expressio unius rule applies. Where there is no definition *Wiles* v. *Maddison*[12] is authority for the proposition that in legislation which is aimed at a particular mischief it is permissible to construe words more widely than they can be construed in the general law of contract. The Act of 1959 is clearly intended to effect a complete ban on flick knives, and therefore the words "offer for sale" in section 1 (1) should be given a meaning wide enough to prevent such goods being placed in shop windows with price tickets behind them.

P. Chadd for the defendant. The Act upon its face prohibits the manufacture, disposition and marketing of flick knives, but it is not aimed against possession. Mere possession of such a knife, even if it is in a shop window, is not an offence within the Act. The expression "offer for sale" is not defined by the Act and therefore it can only be interpreted by reference to the general law. Displaying goods in a shop window does not amount to an offer for sale; it is merely an invitation to treat: *Timothy*

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[6] 28 Cox C.C. 198.

[7] (1834) 6 C. & P. 499.

[8] [1953] 1 Q.B. 401; [1953] 2 W.L.R. 427; [1953] 1 All E.R. 482, C.A.

[9] (1948) 64 T.L.R. 628; [1948] 2 All E.R. 810, D.C.

[10] [1943] 1 All E.R. 315.

[11] [1948] 2 All E.R. 810.

[12] [1943] 1 All E.R. 315.

v. *Simpson.*[13] Where Parliament wishes to extend the ordinary meaning of "offer for sale" it usually adopts a standard form: see Prices of Goods Act, 1939, s. 20, and Goods and Services (Price Control) Act, 1941, s. 20 (4). It would have been simple for the draftsman to have included a definition of "offer for "sale" in the Act of 1959, but he has not done so. The words of section 1 are clear. "Exposed for sale" is not an offence under the section. This is not an omission or a mistake on the part of Parliament, and, even if it were, it would not be for this court to read words into the Act to perfect it: *Bristol Guardians* v. *Bristol Waterworks Co.*[14]

[LORD PARKER C.J. There is a stronger statement of the principle by Lord Simonds in *Magor and St. Mellons Rural District Council* v. *Newport Corporation.*[15]]

Yes; it is not necessary to read words into the Act in order to make it effective. In a civil case no one would contend that it was. Still less should such a course be adopted in a criminal case. In a penal statute the court should not do violence to the words of a statute in order to bring people within it.

As to *Keating* v. *Horwood*,[16] there was there an obvious exposure for sale, so that it was unnecessary for the court to decide whether there was an offer for sale or not. No authorities on this point were cited in that case, nor was this point argued in *Wiles* v. *Maddison*,[17] the whole basis of which was that the prosecution only proved an intention to commit an offence the following day. It would be wrong to attach importance to the incidental words of Viscount Caldecote C.J.[18] on which the appellant relies.

Cox in reply. The Act of 1959 may not be aimed at possession, but it is aimed at preventing people from getting possession of flick knives. Its object is to prevent trafficking in such articles. The meaning of the words "offer for sale" in this particular statute must be drawn from the four corners of the statute itself, and if, interpreting the statute as a whole, and bearing in mind its object, the words are seen to be given a wider meaning than they would bear in the law of contract, that is the meaning that should be given to them.

The definitions in the Prices of Goods Act, 1939, and the Goods and Services (Price Control) Act, 1941, cover matters so widely different, e.g., publishing a price list, making a quotation, that, were it not for the definitions, they could not amount in law to an offer for sale and so would have fallen outside the statutes, but that is no reason for saying that where there is no definition section the words must necessarily be construed as in the law of contract. It is not suggested that words should be read into the Act. The intention of the Act is clear and the court should give the words the meaning they ought to bear having regard to the object of the Act.

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[13] 6 C. & P. 499.

[14] [1914] A.C. 379, H.L.

[15] [1952] A.C. 189; [1951] 2 T.L.R. 935; [1951] 2 All E.R. 839, H.L.

[16] 28 Cox C.C. 198.

[17] [1943] 1 All E.R. 315.

[18] Ibid. 317.

Lord Parker C.J. read section 1 (1) of the Restriction of Offensive Weapons Act, 1959, stated the facts and continued:

The sole question is whether the exhibition of that knife in the window with the ticket constituted an offer for sale within the statute. I confess that I think most lay people and, indeed, I myself when I first read the papers, would be inclined to the view that to say that if a knife was displayed in a window like that with a price attached to it was not offering it for sale was just nonsense. In ordinary language it is there inviting people to buy it, and it is for sale; but any statute must of course be looked at in the light of the general law of the country. Parliament in its wisdom in passing an Act must be taken to know the general law. It is perfectly clear that according to the ordinary law of contract the display of an article with a price on it in a shop window is merely an invitation to treat. It is in no sense an offer for sale the acceptance of which constitutes a contract. That is clearly the general law of the country. Not only is that so, but it is to be observed that in many statutes and orders which prohibit selling and offering for sale of goods it is very common when it is so desired to insert the words "offering or "exposing for sale," "exposing for sale" being clearly words which would cover the display of goods in a shop window. Not only that, but it appears that under several statutes—we have been referred in particular to the Prices of Goods Act, 1939, and the Goods and Services (Price Control) Act, 1941—Parliament, when it desires to enlarge the ordinary meaning of those words, includes a definition section enlarging the ordinary meaning of "offer for sale" to cover other matters including, be it observed, exposure of goods for sale with the price attached.

In those circumstances I am driven to the conclusion, though I confess reluctantly, that no offence was here committed. At first sight it sounds absurd that knives of this sort cannot be manufactured, sold, hired, lent, or given, but apparently they can be displayed in shop windows; but even if this—and I am by no means saying it is—is a casus omissus it is not for this court to supply the omission. I am mindful of the strong words of Lord Simonds in *Magor and St. Mellons Rural District Council* v. *Newport Corporation.*[1] In that case one of the Lords Justices in the Court of Appeal[2] had, in effect, said that the court having discovered the supposed intention of Parliament must proceed to fill in the gaps—what the Legislature has not written the court must write—and in answer to that contention Lord Simonds in his speech said[3]: "It appears to me to be a naked usurpation of the legislative function under the thin disguise of "interpretation."

Approaching this matter apart from authority, I find it quite impossible to say that an exhibition of goods in a shop window is itself an offer for sale. We were, however, referred to several cases, one of which is *Keating* v. *Horwood*,[4] a decision of this court. There, a baker's van was being driven on its rounds. There was bread in it that had been ordered and bread in it that was for sale, and it was found that that bread was under weight contrary to the Sale of Food Order, 1921. That order was an order of the sort to which I have referred already which prohibited the offering or exposing for sale. In giving his judgment, Lord Hewart C.J. said this[5]: "The question is whether on "the facts there were, (1) an offering, and (2) an exposure, for "sale. In my opinion, there were both." Avory J. said[6]: "I "agree and have nothing to add." Shearman J., however, said[7]: "I am of the same opinion. I am quite clear that this "bread was exposed for sale, but have had some doubt whether "it can be said to have been offered for sale until a particular "loaf was tendered to a particular customer." There are three matters to observe on that case. The first is that the order plainly contained the words "expose for sale," and on any view there was an exposing for sale. Therefore the question whether there was an offer for sale was unnecessary for decision. Secondly, the principles of general contract law were never referred to, and thirdly, albeit all part of the second ground.

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[1] [1952] A.C. 189; [1951] 2 T.L.R. 935; [1951] 2 All E.R. 839, H.L.

[2] [1950] 2 All E.R. 1226, 1236, C.A.

[3] [1952] A.C. 189, 191.

[4] (1926) 28 Cox C.C. 198, D.C.

[5] Ibid. 201.

[6] Ibid.

[7] Ibid.

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the respondent was not represented and there was in fact no argument. I cannot take that as an authority for the proposition that the display here in a shop window was an offer for sale.

The other case to which I should refer is *Wiles* v. *Maddison.*[8] I find it unnecessary to go through the facts of that case, which was a very different case and where all that was proved was an intention to commit an offence the next day, but in the course of his judgment Viscount Caldecote C.J. said[9]: "A "person might, for instance, be convicted of making an offer of "an article of food at too high a price by putting it in his shop "window to be sold at an excessive price, although there would "be no evidence of anybody having passed the shop window or "having seen the offer or the exposure of the article for sale at "that price." Again, be it observed, that was a case where under the Meat (Maximum Retail Prices) Order, 1940, the words were "No person shall sell or offer or expose for sale or buy or "offer to buy." Although the Lord Chief Justice does refer to the making of an offer by putting it in the shop window, before the sentence is closed he has in fact turned the phrase to one of exposing the article. I cannot get any assistance in favour of the prosecutor from that passage. Accordingly, I have come to the conclusion in this case that the justices were right, and this appeal must be dismissed.

ASHWORTH J. I agree.

ELWES J. I also agree.

Appeal dismissed with costs.

Solicitors: *Robins, Hay & Waters for T. J. Urwin, Town Clerk, Bristol; Haslewoods for Cooke, Painter, Spofforth & Co., Bristol.*

E. M. W.

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[8] [1943] W.N. 40; [1943] 1 All E.R. 315, D.C.

[9] [1943] 1 All E.R. 315, 317.

1961
Jan. 11, 12,
13, 16.

Lawton J.

WESTON *v.* LAWRENCE WEAVER LTD.

[1956 W. No. 1377.]

Easement—Right of way—Excessive user—Damage by one dominant owner to servient tenement—Whether other dominant owner entitled to sue him for physical damage to servient tenement.

The plaintiff and the defendant company were both entitled to rights of way over a private road which separated their respective properties. Neither of them owned the private road. The plaintiff brought an action against the defendant company for damages for (inter alia) churning up and destroying the surface of the right of way so as to impede its use by the plaintiff:—

Held, that the plaintiff, as the owner of a right of way, could not recover damages for physical damage to the servient tenement, for his right to damages lay in an unlawful interference with his right to pass and repass over it; and, since, on the evidence, the damage caused to the servient tenement did not substantially interfere with his right to pass and repass, he had no cause of action under that head of claim.

ACTION.

The plaintiff, Maurice Weston, was at all material times the owner and occupier of certain property known as Elibank, St. Mary's Hill, Sunninghill, Berkshire. The plaintiff's property was bounded on the south and east by two public highways, and on the north by a private road which gave access from the plaintiff's property to one of the public highways, St. Mary's Hill. The defendant company's property was situated immediately to the north of the private road. At the end of the private road farthest from St. Mary's Hill there was access to the defendant company's property and also to another property, known as Hayning, situated immediately to the west of the plaintiff's property. The only entrance to the plaintiff's property for vehicular traffic was the entrance on the private road.

The private road was about 10 feet wide with a narrow grass verge on the plaintiff's side and a wider grass verge, with a shallow ditch, bank and hedge, on the defendant company's side. The owner of the soil of the private road was unknown.

The plaintiff's property was conveyed to him on May 23, 1955, "together with the right of way so far as the vendor can lawfully "convey the same to pass and repass with or without vehicles "along the private road . . . which right has been enjoyed by the "predecessors in title of the vendor since the year 1899."

The defendant company's property was conveyed to it by a conveyance dated August 31, 1955, "together with (so far as the "vendor can grant the same) a right of way for all purposes as at "present enjoyed (in common with the vendor and all others "entitled to a like right) over" the private road. Neither the plaintiff nor the defendant could prove any right to a right of way by grant.

After the plaintiff had purchased his property, he demolished the house then standing on it and built a new house. The plaintiff went into occupation of his property on June 20, 1956. In about March, 1956, the defendant company began building 49 houses on its property with an access road to St. Mary's Hill, which ran parallel to the private road at a distance of about 20 feet therefrom. In the course of the building operations, the bank and hedge on the north side of the private road were removed and the ditch filled in.

On June 1, 1956, the plaintiff started an action in which he claimed that he had a right of way over the private road and that the defendant company had created a nuisance on the right of way by (i) wrongfully obstructing it with heaps of building materials intended for the building estate on the defendant company's property; (ii) using it wrongfully and/or excessively for the passage, turning and parking of lorries and other heavy vehicles or equipment; (iii) by churning up and destroying the surface of the right of way so as to impede its use by the plaintiff and his licensees, and (iv) wrongfully removing the bank and hedge and filling in the ditch on the north side of the way thereby causing damage to the surface of the way and impeding its user by the plaintiff and his licensees. The plaintiff claimed damages, an injunction restraining the defendant company, its servants or agents from the repetition or continuance of the acts of nuisance and interference, and an order that the defendant company replace the bank and replant the hedge.

The defendant company claimed that it had a right of way over the private road and denied that it had committed any nuisance thereon.

On July 30, 1956, an interlocutory injunction was granted restraining the defendant company from wrongfully obstructing the private road with heaps of aggregate, gravel or other building materials, and from wrongfully or excessively using the private road for the passage, turning and parking of lorries and other heavy vehicles or equipment until August 14, 1956. On August

14, 1956, this injunction was discharged, on the defendant company's undertaking until trial or further order that it would not (whether by itself, its servants or agents) obstruct the passage of vehicles to and from the plaintiff's property over the private road whether by depositing heaps of gravel or other materials thereon or otherwise, provided that the undertaking should not restrict the defendant company from exercising the right of way claimed in its defence over the private road.

In 1959, the plaintiff sold his property. When the action came on for hearing, the claim for an injunction and for an order that the bank be replaced and the hedge replanted were not proceeded with. Evidence was given as to the user of the private road by the plaintiff and the defendant company, and by their respective predecessors in title, and as to alleged obstruction of the road by vehicles belonging to the defendant company, and by heaps of building material intended for use on the defendant company's building estate. The evidence as to the condition of the surface of the private road showed that there was some wear and tear to the whole surface, and that at the place where traffic going to the plaintiff's property would turn off the private road into the entrance to the plaintiff's property, ruts had formed in which rain-water was inclined to stand, forming large puddles.

The case is reported only on the question whether the plaintiff, as dominant owner of a right of way, had a right of action against the defendant company, as another dominant owner of a right of way over the same servient tenement, for physical damage to the servient tenement by excessive user of the defendant company's right of way.

A. Leolin Price and *Miss V. A. Moxon* for the defendant company. The plaintiff, as dominant owner of a right of way, would have a right of action for nuisance against the defendant company if it damaged the surface of the private road in such a way as substantially to obstruct the plaintiff's right of passage along the road: Halsbury's Laws of England, 3rd ed., vol. 12, p. 580; Gale on Easements, 13th ed., p. 350; *Original Hartlepool Collieries Co.* v. *Gibb*.[1] While the owner of the soil of a right of way is entitled to complain if his land has been damaged by the excessive user of the way by a dominant owner which has increased the burden on the servient tenement, in the present case the person complaining is not the servient owner but a co-dominant owner. On the evidence, the road has not been churned up to the extent which is necessary to found an action for nuisance by a dominant owner. The way has not been ploughed up so that the plaintiff cannot use it.

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[1] (1877) 5 Ch.D. 713.

A person entitled to a right of way may carry out works on it if he chooses, but the servient owner is under no obligation to repair it. If the servient owner, in making ordinary use of his land, damages the surface of the way, a dominant owner cannot complain unless the damage makes passage along the way impossible. It is submitted that that principle also applies to use by a dominant owner.

There is no reported case concerning a dispute between two dominant owners relating to damage to the surface of the servient tenement over which they both have rights of way. *Milner's Safe Co. Ltd.* v. *Great Northern and City Railway* [2] was an action between two dominant owners, but it does not deal with the general principle. Ordinarily, the person entitled to bring an action in respect of excessive user which does not render the way impassable is the servient owner. Such an action is not for nuisance but for trespass: Halsbury's Laws of England, 3rd ed., vol. 12, p. 581. An action for trespass by the dominant owner of a right of way is contrary to the general law, for an action for trespass to land can only be brought by the person in possession of the land trespassed upon who would, in the present case, be the owner of the servient tenement. Any action brought by a dominant owner must be an action for nuisance.

John Bradburn for the plaintiff. There appears to be no reported case in which one dominant owner has brought an action for damages against another dominant owner for physical injury to the servient tenement; but it is submitted that such injury gives a dominant owner a right of action if it interferes with his exercise of his right of way, even though it may not completely prevent him from exercising it.

A servient owner is the absolute owner of the servient tenement and his right to use his own land as he wishes will not be restricted more than is necessary to allow the dominant owner to exercise his right of way. It is argued for the defendant company that to give the dominant owner a cause of action the interference must be tantamount to "ploughing up" the way. But here the injury complained of results from the acts of another dominant

[2] [1907] 1 Ch. 208; 23 T.L.R. 88.

owner acting in excess of his own right of way, and it is submitted that in those circumstances a lesser degree of injury will give a cause of action than would be required as against a servient owner making use of his own land.

Further, the removal of the bank and hedge and the filling in of the ditch (even assuming, contrary to the plaintiff's submission, that the ditch was on the defendant company's property) contributed to the injury to the surface of the private road because it resulted in rain-water flowing on to the private road from the defendant company's land and from the highway which would otherwise have flowed along the ditch. The owner of a sole right of way who repairs the way would have a right of action against the owner of land adjoining the way who altered his land so as to cause water to flow on to the way if the presence of the water caused the user of the road by the owner of the right of way to injure the surface of the way and thus increased the repairs necessary to be done to the way. So, a fortiori, there is a right of action, in the present case, where the defendant company has not only caused water to flow on to the way but has also (by excessive user of its own right) contributed to churning it up.

LAWTON J. found, on the evidence, that the owners of the plaintiff's property had a right of way over the private road for general purposes connected with the use of that property as a residential property, and the owners of the estate, of which the defendant company's property had been part, had a right of way limited to the disposing of timber and horticultural purposes connected with the good management of the estate, and to foot passengers who were the owner's or occupier's licensees; that the defendant company had no right to use the private road for any purpose connected with the building of houses on its building estate so that the lorries which obstructed the plaintiff on three or four occasions had no right to be on the private road, and that this obstruction was a substantial interference with the plaintiff's right of way, for which he was entitled to damages of £50; that there was no substantial interference with the plaintiff's right of way by spillage of building materials on to the private road; that the wear and tear to the surface of the private road was not substantial to any part other than the part by the entrance to the plaintiff's property, and that the traffic to the defendant company's building estate was responsible for two-thirds of that wear and tear and the traffic to the plaintiff's property for one-third. His

Lordship continued: A somewhat novel problem arises with regard to the plaintiff's claim for damages for wear and tear caused by the extra traffic on the private road. I have been told by counsel that their combined researches have not revealed any case similar to this where there has been excessive user by one dominant owner causing damage to the surface of the servient tenement in circumstances where the servient owner has not sought any remedy, but another dominant owner has. The damage suffered here is primarily damage to the servient tenement. It seems to me on principle that the plaintiff cannot claim for physical damage to the servient tenement. His right to damage lies in an unlawful interference with his right to pass and repass, and, unless the damage caused to the servient tenement substantially interferes with his right to pass and repass, in my judgment he has not succeeded in establishing a cause of action. It is interesting to see that the pleader who drafted the statement of claim on behalf of the plaintiff—it was not Mr. Bradburn—pleaded in this way: "The defendants have created a nuisance on the said way . . . "by churning up and destroying the surface of the said right of "way so as to impede its use by the plaintiff and his licensees." I am not satisfied that the word "impede" is really the best word to use, but, if one substitutes the phrase "interfere with," it seems to me that the pleader has put the matter in its correct legal form.

In my judgment, I have to ask myself whether the plaintiff has proved that such damage to the surface of the private road as I have found to have been caused by the defendants' excessive use substantially interfered with the use of the private road by the plaintiff and his licensees, and the evidence with regard to that seems to me to be non-existent.

[His Lordship referred to the evidence, and continued:] In the circumstances I do not find that there was a substantial interference with the plaintiff's rights of access from and to his property, and I award no damages in respect of that. I also hold, as a matter of law, that the plaintiff cannot claim in respect of physical damage done to the surface of the servient tenement.

[His Lordship indicated that if the plaintiff were entitled to damages he would assess the amount of damage to the servient tenement caused by the defendant company's excessive user at £30, and held that the plaintiff was not entitled to recover damages for nuisance caused by the removal of the hedge and bank and the filling in of the ditch on the north side of the private road, which hedge, bank and ditch his Lordship held belonged to the defendant company.]

Judgment for the plaintiff in the sum of £50. Plaintiff to be entitled to three-fourths of the general costs of the action, including the costs reserved, to be taxed on a party and party basis on the High Court scale. No special order with regard to the costs of amendments.

Solicitors: *H. E. Aston & Co.; Gamlen, Bowerman & Forward for Lovegrove & Durant, Windsor.*

V. A. M.

C. A.

1960
Oct. 18, 19.

Sellers, Holroyd Pearce and Devlin L.JJ.

LONGHURST *v.* GUILDFORD, GODALMING AND DISTRICT WATER BOARD.

[1958 L. 764.]

Factory—Definition—Pumping station—"Altering" or "cleaning" an article—Water—Whether an "article"—Whether pumping station a "factory"—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 151 (1) (6) (9).

The plaintiff was employed by a water board at one of their pumping stations. In the course of his employment he was injured when his right hand was caught in the transmission machinery of a pump house at the station. The purpose of the pump house was to put the water under pressure after it had been filtered in the filter house. The plaintiff brought an action against the board alleging negligence at common law and breaches of statutory duty under section 13 of the Factories Act, 1937[1]:—

[Reported by A. H. BRAY, Esq., Barrister-at-Law.]

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[1] Factories Act, 1937, s. 13 (1): "Every part of the transmission "machinery shall be securely fenced "unless it is in such a position or of "such construction as to be as safe "to every person employed or work-"ing on the premises as it would be "if securely fenced."

S. 151 (1): "Subject to the pro-"visions of this section, the expression "'factory' means any premises in "which, or within the close or cur-"tilage or precincts of which, persons "are employed in manual labour in "any process for or incidental to any "of the following purposes, namely:— ". . . (*b*) the altering, . . . clean-"ing . . . of any article; or (*c*) the "adapting for sale of any article; "being premises in which, or within

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Held, that whether or not water was an "article" within section 151 (1) of the Act of 1937, which was altered or cleaned in the filter house, thereby making those premises a factory within the section, the putting of water under pressure in the pump house was not a factory process, but mere distribution, and by virtue of section 151 (6) of the Act the pump house was not and did not form part of a factory within the meaning of the Act; accordingly, as the plaintiff had failed to establish any breach of common law duty, the action failed.

Per Devlin L.J. An "article" is something that is articulated, that is, separated from an amorphous mass and given shape and form, and in the ordinary use of language water is not an article while it is being cleaned in a filter house or retained in an underground tank or other form of reservoir (post, pp. 418, 419).

Cox v. *Cutler (S.) & Sons Ltd. and Hampton Court Gas Co* [1948] W.N. 345; [1948] 2 All E.R. 665, C.A. considered.

Decision of Lord Parker C.J. [1960] 2 Q.B. 265; [1960] 2 W.L.R. 383; [1960] 1 All E.R. 54 affirmed.

APPEAL from Lord Parker C.J.[2]

The plaintiff, Nicholas Alexander Irwin Longhurst, was employed by the defendants, the Guildford, Godalming and District Water Board, as an engine driver at their pumping station at Hambledon in Surrey. On February 1, 1958, fairly early in the afternoon, the plaintiff met with a serious accident when he got his right hand caught in the bite formed by a belt and pulley, and as a result the whole of his right arm had to be amputated just below the shoulder. At the time of the accident, the plaintiff was in charge of the station, and had worked there for some seven years, and for a long time before that he had been working at other stations. The station at Hambledon consisted of a fenced-in area of some 64 acres, in which water was collected from springs and brought down to a filter house. The water came by gravity to the filter house, passing through filters to extract any foreign matter, and from there it went down to a large concrete tank, which extended under the filter house and also

"the close or curtilage or precincts of "which, the work is carried on by "way of trade or for purposes of gain "and to or over which the employer "of the persons employed therein has "the right of access or control: . . . "(6) Where a place situate within the "close, curtilage, or precincts forming "a factory is solely used for some "purpose other than the processes "carried on in the factory, that place "shall not be deemed to form part "of the factory for the purposes of "this Act, but shall, if otherwise it "would be a factory, be deemed to "be a separate factory. . . . (9) Any "premises belonging to or in the "occupation of . . . any . . . public "authority shall not be deemed not "to be a factory, . . . by reason only "that the work carried on thereat is "not carried on by way of trade or "for purposes of gain."

[2] [1960] 2 Q.B. 265; [1960] 2 W.L.R. 383; [1960] 1 All E.R. 54.

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under the whole or part of the intervening space between the filter house and another house called the pump house. On the way to the concrete tank from the filters it received some chlorine solution in order to chlorinate the water, which solution was fully disseminated in the water in the tank. Apart from the filters and the chlorination plant, there was only a small Petter engine used for cleaning the filters in the filter house. In the pump house there was one large engine and pump and two smaller engines and pumps which took the water out of the concrete tank, put it under pressure and forced it along the mains. Part of the water put under pressure went to a reservoir which was at a higher level and from which it fell by gravity to feed the houses in the district, and part of it went direct through the mains also to houses in the district. The floor of the pump house consisted partly of concrete and partly of quarry tiles round the pumps.

The accident probably occurred between 2 p.m. and about 4.30 p.m. on the afternoon of Saturday, February 1, 1958, when the plaintiff was in charge of the station. The plaintiff was found some time after 8 p.m. on that day hanging over some guard rails by a machine in the pump house, almost unconscious, although he was muttering complaints about his back. His right hand was found completely mangled, as if it had gone into the bite of the belt and pulley. There was blood on the floor and the plaintiff was found to be wearing a gauntlet glove on his left hand, and the glove which at some time had been on his right hand was lying on the ground under the pulley showing marks of having been through the bite.

The vital point of the machine for the purposes of the case was the bite between a pulley consisting of five rather sharp edges with grooves in between and the belt, which was really four belts joined together and which ran in the grooves of the pulley. There were guard rails about 3 feet high. At the position opposite the bite formed by the belt and pulley, the top guard was horizontally about 13 inches from the edge on the side of the pulley, and in the vertical it was about 6½ inches above. The plaintiff, when he was found, had both arms over the top guard rail and was standing square to the pulley, his right arm being caught and kept by the rotation of the pulley between the side of the pulley and the bearing.

The plaintiff brought an action against the defendants for damages in respect of his injuries, alleging that the defendants were in breach of the duty owed by master to servant at common law and further, or alternatively, for their breach of statutory duty under section 13 of the Factories Act, 1937. It was alleged by the plaintiff that the pumping station was a factory within the meaning of the Factories Act, 1937, as defined in section 151 (1), (6), (9) of that Act.

On November 27, 1959, Lord Parker C.J. gave judgment for the defendants, holding that there was no breach of common law duty and that, although water could be an "article" within the meaning of section 151 (1) of the Factories Act, 1937, and that the process of filtering the water in the filter house of the station was the altering or cleaning of an article within the meaning of that section, the putting of water under pressure in the pump house was not an altering of water or an adapting for sale of water and, being something other than one of the processes for or incidental to what was carried on in the filter house, the pump house was not, and did not form part of, a factory within the meaning of the Act. Accordingly, the plaintiff's claim failed.

The plaintiff appealed.

Glynn Blackledge Q.C. and *Peter Perrins* for the plaintiff. The main purpose of the pumping station was to supply pure and wholesome water and so it was a factory. This being one station in one curtilage, on the finding that the process of filtering in the filter house was the cleaning of an article, one cannot take out the pump house and say it was not a factory. The putting of the water under pressure in the pump house, which was part of the defendants' duty, was a filling of containers within the meaning of section 151 (1) (iii) of the Factories Act, 1937. The process in the pump house was ancillary to the main purpose of the pumping station. It was all one continuous process throughout the two premises: see *Thurogood* v. *Van Den Berghs & Jurgens Ltd.*[3] To extract the pump house from the factory under section 151 (6) of the Act of 1937 it must be clearly shown that the purpose of the pump house was other than that of the factory. The purification and pressurisation of the water were interdependent.

[Sellers L.J. Assuming this was a factory, how did any breach of statutory duty cause this accident?]

The accident could not have happened but for the failure to fence: see *Stimpson* v. *Standard Telephones and Cables Ltd.*[4] The rails here were not a fence at all. Any reasonable employer should have foreseen that a workman might lean over and get his hand caught. *John Summers & Sons Ltd.* v. *Frost*[5] shows the extent of the factory owner's duty. Water boards have assumed that such a pumping station was not a factory and have not tried to fence. On the aspect of common law negligence, Lord Parker C.J. did not deal with the point that the danger of such an accident had been foreseen.

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[3] [1951] 2 K.B. 537; [1951] 1 T.L.R. 557; [1951] 1 All E.R. 682.

[4] [1940] 1 K.B. 342; 56 T.L.R. 90; [1939] 4 All E.R. 225, C.A.

F. W. Beney Q.C. and *E. W. Eveleigh* for the defendants. Under section 151 (6) of the Factories Act, 1937, one has to see whether the pump house was used solely for or incidentally to the processes carried on in the factory, assuming that the filter house constituted a factory. Putting pressure on the water was not the same as chlorinating or filtering the water. The pump house performed no function in relation to the filter house. As to "adapting for sale," see *Wiltshire County Valuation Committee* v. *London Co-operative Society Ltd.*[6] and *Hudson's Bay Co.* v. *Thompson (Valuation Officer)*.[7] What had occurred here was that not merely had this kind of guard rail been used for many years, but it was used throughout the country. This was an accident which could not have been anticipated. *Burns* v. *Joseph Terry & Sons Ltd.*[8] shows that the test of foreseeability applies to the duty to fence securely as well as to common law negligence. The accident to the plaintiff was quite inexplicable, so how can it be said that his employers ought to have foreseen what was inexplicable?

[DEVLIN L.J. An employer may have to foresee that an employee will be deliberately silly.]

[Reference was made to *Carroll* v. *Andrew Barclay & Sons Ltd.*[9]] Here there is no indication of what the danger was that had to be guarded against.

The pumping station or any part of it was not a factory. An article has to be capable of being made or adapted. Water is a chemical compound. The sea or a river or a lake or underground springs are not articles. Water is not an article, because it is a natural liquid. The gas in *Cox* v. *S. Cutler & Sons Ltd. and Hampton Court Gas Co.*[10] was manufactured. Anyone reading section 151 (1) (iii) of the Act of 1937 would be surprised to be told that the piping system of the pump house came within the word "containers." Though pipes temporarily hold water, they do not contain it, but primarily convey it.

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[5] [1955] A.C. 740; [1955] 2 W.L.R. 825; [1955] 1 All E.R. 870, H.L.

[6] (1950) 66 T.L.R. (Pt. 1) 1016; [1950] 1 All E.R. 937, D.C.

[7] [1959] 3 W.L.R. 317; [1959] 3 All E.R. 150, H.L.

[8] [1951] 1 K.B. 454; [1951] 1 T.L.R. 349; [1950] 2 All E.R. 987, C.A.

[9] [1948] A.C. 477; 64 T.L.R. 384; [1948] 2 All E.R. 386.

[10] [1948] W.N. 345; [1948] 2 All E.R. 665, C.A.

Blackledge Q.C., in reply, referred to *Williams* v. *Amalgamated Anthracite Collieries Ltd.*[11] The whole process at the pumping station was a continuing process. Whenever water is contained as it was here it is an article. Where there is a breach of duty under the Factories Act, 1937, and damage follows, it does not lie in the employer's mouth to say that you cannot prove causation: *Stimpson* v. *Standard Telephones and Cables Ltd.*[12]

SELLERS L.J. If this case involved a final decision on a number of the difficult, important and interesting points which have been raised in the argument, I should have wanted further time to consider how those matters should be dealt with, but in my view this is an unsatisfactory case indeed in which to decide those important and far-reaching matters and I do not find that it is necessary to give attention to them. My inclination, having read the findings of Lord Parker C.J., is to hold that the case fails in limine. It is one of those happily rare cases where, notwithstanding all the investigation that can be carried out, the court cannot find a satisfactory explanation of how the accident happened. It cannot say with any degree of certainty what took place. In those circumstances it is difficult indeed to consider the further matters as to where liability lies. But again, I need not pursue that more fully. That aspect of the matter would require much further consideration than these few perfunctory words of mine have given it. But it is at least desirable for a court to start with a satisfactory and acceptable finding of how an accident happened and from that to proceed to consider the issues of liability.

The ascertainable facts in this case have been found with such clarity by the Lord Chief Justice that I do not feel there is any occasion for me to delay to restate them. They are, in effect, unchallenged. It is on those facts that the Lord Chief Justice found that there was no breach of duty by the defendants to the plaintiff at common law. That was the subject of the first attack made upon the judgment by counsel for the appellant, but I am satisfied that on these facts the Lord Chief Justice arrived at the right conclusion. As what he said has a bearing on the whole case, particularly in relation to the remarks which I have just made, I will read a brief extract from the decision on the allegations of breach of common law duty. The Lord Chief Justice said [1]: "I can find here no breach of the common law duty. The "evidence is that the guard rails—the broad guard rails—provided "in this station were the same as are provided in pumping "stations all over the country. As Mr. Bewsher, the expert "called for the plaintiff, said, the layout is the same, and his "words were that it would be very unusual to find anything in "the nature of close fencing round these machines. There is "no evidence of any previous accidents. Moreover, this is a job "that a man does on his own without any hurry—there is none "of the bustle of a factory or works—where he has ample time to "do his work. For my part, I am quite unable to say, to use the "other test, that it was folly on the part of the employers not to "provide some close fencing which would have prevented, and "which alone would have prevented, this accident." Towards the end of the judgment the Lord Chief Justice indicates that he has considered some of the answers made by a Mr. Fletcher in the course of the evidence.

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[11] (1932) 25 B.W.C.C. 634, C.A.

[12] [1940] 1 K.B. 342.

I have nothing more to say on that. I think that on this evidence the plaintiff has entirely failed to establish any breach of common law duty and the matter is adequately dealt with by the judgment.

But the case was framed also on the basis that there had been a breach of the Factories Act, 1937, with regard to fencing of the pumping machinery which was in the pump house. The answer to that was that the pump house where the accident happened was not subject to the Factories Act, 1937. Apparently waterworks such as these have been regarded throughout the years as not coming under the terms of the Factories Acts and the matter has had to be considered afresh in this case. [His Lordship referred to the facts and continued:] It was submitted on behalf of the defendants that no consideration need be given to the requirements of the Factories Act, 1937, in regard to safety, particularly section 13 in this case, because the Factories Act itself does not apply. The Lord Chief Justice has accepted that submission and I am of the view that this court should not interfere with that. He arrived at a conclusion which I find acceptable although it raises questions which are, perhaps, not wholly free from doubt. It requires consideration of some provisions of section 151 of the Factories Act, 1937. Subsection (9) of that section need not be referred to more fully. Quite clearly, although this waterworks undertaking is not carried on for gain it is a public work which would make the Act applicable if it otherwise applied. The question has arisen as to the application of section 151 (1), which reads as follows: " Subject to the provisions of this " section, the expression ' factory ' means any premises in which, " or within the close or curtilage or precincts of which, persons " are employed in manual labour in any process for or incidental " to any of the following purposes, namely:—(*a*) the making of " any article or of part of any article; or (*b*) the altering, repairing, " ornamenting, finishing, cleaning, or washing, or the breaking " up or demolition of any article; or (*c*) the adapting for sale of " any article; being premises in which, or within the close or " curtilage or precincts of which, the work is carried on by way " of trade or for purposes of gain," which does not apply here, " and to or over which the employer of the persons employed " therein has the right of access or control."

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[1] [1960] 2 Q.B. 265, 269.

The Lord Chief Justice has found that in the filter house of these premises there was taking place an altering and cleaning of the water which was brought in, and as I understand it that particular finding was not challenged before this court. What happens, it seems, speaking very broadly, and I refer always to the judgment for the relevant facts without restating them, is that water is collected at the filter house from springs and streams and held there in a tank, the dimensions of which we have not been given, and while there it is cleaned, or perhaps as it enters there it is cleaned, by filtering, and also altered, in that it is purified by a process of adding chlorine in some form or another and in some way or other to the water. But the argument that was advanced under section 151 (1) (*b*) of the Act of 1937 was that although that might well be true it was not altering or cleaning " of any " article " because it was said that " article " was not an appropriate word to use in connection with water, or water which was dealt with in that way coming in from springs and other sources.

The judgment in dealing with this matter cites the observations of Scott L.J. in this court in *Cox* v. *S. Cutler & Sons Ltd.*[2] The article or substance (if that is a better word to use) in question there was not water but gas, and certainly in the course of that judgment, and I do not repeat it as it is set out in the judgment which is the subject of appeal, gas was treated as something

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[2] [1948] W.N. 345; [1948] 2 All E.R. 665, C.A.

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which would come under the word "article" in this section. It is a difficult matter. In some circumstances water in bulk, in the ocean for example, might well not normally be referred to as an "article," but this particular provision does relate to a substance which is being treated in some way: it is the subject of a "process"; and in this case we are dealing with an amount of water which has been accumulated in a given space, that is, the extent of the container underneath the tank, and treated in that way.

While I have appreciated the argument of Mr. Beney to the contrary, I do not feel satisfied that I would take a different view from that expressed by the Lord Chief Justice, having considered such authority on the question as there is. It may well be that the point will arise more essentially for consideration at some other time, and that, in my view, would be a more appropriate time to consider this more fully than is necessary now. Lord Parker C.J., having found that the filter house was a "factory," went on to consider whether, nevertheless, the pump house was a "factory." He came to the conclusion that it is not, and again I accept the view that the judgment takes on that matter. Therefore one can assume for the purposes of this case that which has been found by Lord Parker C.J., that the filter house would be a "factory," without conclusively deciding it.

The pump house calls for consideration under section 151 (6) of the Factories Act, 1937: "Where a place situate within the "close, curtilage, or precincts forming a factory is solely used for "some purpose other than the processes carried on in the factory, "that place shall not be deemed to form part of the factory for "the purposes of this Act, but shall, if otherwise it would be a "factory, be deemed to be a separate factory." There is no question here that it would not be deemed to be a separate factory. The question is whether the pump house, not contiguous to, only adjacent to, this filter house in the way that has been described, is "solely used for some purpose other than the processes carried "on in the factory," and the purpose which was set up in order to bring the pump house under subsection (6) is that it was used, as its name would imply, to pump water and for the pumping of water under pressure so that the water is taken and distributed, in the way I have already indicated, to the reservoir and to certain houses or consumers on the way to it. Putting water under pressure and pumping it in that way I think could not, as the Lord Chief Justice held, be held to be altering or cleaning or adapting it. It is not a factory process at all; it is mere distribution. It has been argued that it is so closely associated with the filtering that it ought not to be regarded as "solely used for some "purpose other than the processes . . ." I think that again is a narrow point, but I am not prepared to take a different view from that of the Lord Chief Justice. Dealing with this very shortly, I would uphold the judgment appealed from on the grounds which brought the Lord Chief Justice to that decision.

That would conclude this appeal against the appellant; but I must say that if the decision so far had been to the contrary, other questions would have arisen. There would have been not only the question of how the accident happened and the question of causation, but also how the matter would stand as to any breach of the Factories Act provision which it is alleged had to be considered. The court has had its attention drawn to the observations of Somervell L.J., which were agreed to by Cohen L.J., in *Burns* v. *Joseph Terry & Sons Ltd.*,[3] and to the observations in the speeches in the House of Lords, particularly the speech of Lord Simonds, in *John Summers & Sons Ltd.* v. *Frost*.[4] Applying those authoritative statements to such facts as one could affirmatively derive from the evidence in this case, it might be very difficult to answer the question whether, as there was a fence here, such fence was a secure fence. That aspect of the case, if my view as to the decision of Lord Parker C.J. had been otherwise, certainly would have been one which would have required very careful consideration.

Out of respect to Mr. Blackledge's argument, I ought to add one matter, although it was not dealt with in the court below and it was not the subject of a notice of appeal. Mr. Blackledge urged before this court that he could bring the pump house within the description of a "factory" in another way than that with which I have already dealt. He referred to section 151 (1) of the Factories Act, 1937, which provides: " . . . And (whether or not "they are factories by reason of the foregoing definition)," which I read earlier, "the expression 'factory' also includes the following premises in which persons are employed in manual labour, "that is to say . . . (iii) any premises in which the business of "washing or filling bottles or containers or packing articles is "carried on incidentally to the purposes of any factory." I understand the argument to be that in the pumping house the water was put into a container in that it was put into the pipe in order to be pumped up to the reservoir and that that falls under that particular provision. I think that it would be a straining of that subsection to the extreme so to hold, and having stated the argument I reject it.

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[3] [1951] 1 K.B. 454; [1951] 1 T.L.R. 349; [1950] 2 All E.R. 987, C.A.

[4] [1955] A.C. 740; [1955] 2 W.L.R. 825; [1955] 1 All E.R. 870, H.L.

I would dismiss the appeal.

HOLROYD PEARCE L.J. I agree, and I have nothing to add.

DEVLIN L.J. I agree with the decision of Lord Parker C.J. on the meaning and effect of section 151 (6). On the assumption that the filter house is a factory, or rather that the filter house makes the premises a factory, I agree that the pump house falls within subsection (6).

I should like to say, however, because, as my Lord has indicated, the point must be one of considerable importance to water undertakings, that if I had been sure that I was not constrained by authority to decide otherwise, I should have decided this case on the simple ground that the premises were not a "factory" at all, since water is not an "article" within the meaning of section 151 (1).

The test to be applied is that which is set out by Scott L.J. in the case to which my Lord has referred, *Cox* v. *S. Cutler & Sons Ltd.*,[5] where he says[6] that the word "article," not being defined in the Act itself, must be given "its ordinary meaning in "the English language." To my mind, an "article" is something that is articulated, that is, separated from an amorphous mass and given shape and form. I do not think that anything can be called an "article," either in strict terminology or in ordinary language, unless it has shape and form. Certainly in ordinary language no one talks of the elements, water, air, gas or fire, as "articles" unless they are confined; and then, together with their container, they may become an "article." I say "may," because I think it depends on the container. I should not regard gas within the four walls of a room, or water in pipes or in a tank, as an "article."

I agree that water is a commodity which can be bought, sold, or stolen. But I do not agree that all commodities, in all states, are "articles." Grain in bulk is a commodity, generally bought and sold; but I do not think that in ordinary language it would be called an "article." If it is, the ordinary cleaning and drying plant on a farm would appear to be a "factory." It may be that the reason why farm premises are not generally regarded as a factory is because they are handling wheat, straw, milk and other commodities which, at the farm stage, are not "articles" within the meaning of the section or made into articles. However this may be, I think that in the ordinary use of language, water is not an article while it is being cleaned in a filter house or retained in an underground tank or other form of reservoir.

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[5] [1948] 2 All E.R. 665.

[6] Ibid. 667.

Lord Parker C.J. has decided otherwise, following the authority provided by the decision of *Cox* v. *S. Cutler & Sons Ltd.*[7] I recognise, of course, that the judgment of Scott L.J.,[8] even if it does not carry with it the ratio decidendi of the case, is of high, persuasive authority. Nevertheless, if I were satisfied that it were only an obiter dictum, I feel, though with diffidence, sufficiently clear in my view to express my disagreement with Scott L.J. But I am not sure whether Scott L.J.'s dictum[9] is part of the ratio or not. As Lord Parker C.J. rightly pointed out, his observations about water are obiter, because the case was concerned with gas. I could not distinguish the case on that ground, because his reasoning in relation to gas defeats, if it is correct, the reasoning which I have endeavoured to express. The question whether his reasoning is obiter or not depends, first, upon the extent to which it was implicitly adopted by the other two members of the court, for they do not expressly agree with that passage in Scott L.J.'s judgment, and secondly, if it was so adopted, the extent to which it was essential to the decision of the court.

In view of the fact that I am, though not with great certainty, because the point is a difficult one, prepared to agree with the Lord Chief Justice's decision on the application of subsection (6), I do not think it is necessary or desirable for me to take up time by examining whether *Cox* v. *S. Cutler & Sons Ltd.*[10] concludes for this court the question whether water is an "article."

Appeal dismissed with costs.
Leave to appeal to the House of Lords.

Solicitors: *Darracotts; William Charles Crocker.*

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[7] [1948] 2 All E.R. 665.
[8] Ibid. 666.
[9] Ibid. 667.
[10] [1948] 2 All E.R. 665.

1961
Jan. 26.

Lord Parker C.J., Salmon and Winn JJ.

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Road Traffic—Maintenance of vehicle—Motor-lorry towing trailer—Connected by tow bar and ball and socket unit—Both parts of good construction and in good repair—Faulty coupling—Accident caused through trailer becoming disengaged from lorry—Whether a breach of obligation to maintain—"Maintenance"—Meaning—Motor-Vehicles (Construction and Use) Regulations, 1955 (*S.I.* 1955, *No.* 482), *reg.* 73 (1).

The appellant, a fair-ground showman, drove out of a fair-ground and along a road a motor-lorry connected to a trailer caravan by an automatic coupling device consisting of a tow bar attached to the trailer with a socket at the end which fitted over a ball-unit attached to the lorry. After travelling over the bumpy fair-ground and along two roads, one of which had a bumpy surface, the trailer became disengaged from the lorry, veered across the road, and collided with an oncoming motor-cycle, killing the motor-cyclist and injuring his passenger. Justices, before whom the appellant was charged with an offence under regulation 73 (1) of the Motor-Vehicles (Construction and Use) Regulations, 1955,[1] found, inter alia, that the tow bar and ball-unit which formed the connection between the two vehicles were of good construction and in good repair, but that the trailer had become disengaged owing to faulty coupling either by the appellant or his servant, and that there was a breach of regulation 73 (1):—

Held, (1) that the justices were justified on the evidence in finding that it was the faulty coupling which caused the trailer to become disengaged.

(2) That regulation 73, being in Part III of the regulations of 1955, was concerned with the maintenance of the vehicles and parts and accessories thereof and, having regard to the mischief aimed at by the regulations, "maintenance" meant that the vehicles, parts and accessories thereof should not only be in good repair but in efficient working order. As the tow bar and ball and socket unit were improperly coupled they were not in efficient working order and, accordingly, there had been a breach of regulation 73 (1). Accordingly, the justices had come to a correct conclusion and the appeal must be dismissed.

CASE STATED by Portsmouth justices.

On January 11, 1960, an information was preferred by the respondent, Frank Aubrey Brown, against the appellant, Patrick John O'Neill, alleging that on November 18, 1959, at Portsmouth the appellant unlawfully used on a road, Northern Parade, a trailer towed by a motor-vehicle, a motor-lorry, a certain part of such vehicle, namely, the tow bar, not being in such condition that no danger was likely to be caused to any person on the vehicle or on the road, contrary to regulations 73 (1) and 104 of the Motor-Vehicles (Construction and Use) Regulations, 1955, made under section 30 of the Road Traffic Act, 1930.

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[1] Motor-Vehicles (Construction and Use) Regulations, 1955, reg. 73 (1): "Every motor-vehicle, every trailer "drawn thereby and all parts and "accessories of such vehicle and "trailer shall at all times be in such "condition, . . . that no danger is "caused or is likely to be caused to "any person on the vehicle or trailer "or on a road."

The justices heard the information on March 11 and the following are among the facts they found: On November 18, 1959, the appellant, a showman, was the driver of the lorry and trailer. The two vehicles were coupled by means of a tow bar, consisting of a metal rod 18 inches in length and varying in diameter between approximately 1 and 2½ inches, the smaller end of which was attached to the trailer. At the larger end of the tow bar, on the underside, there was a socket, designed to receive a metal ball-unit which was attached to the rear of the motor-lorry. The interior of the tow bar contained a spring-loaded plunger, the concave end of which projected as a result of spring pressure into the socket. Incorporated in the socket-end of the tow bar was a spring-loaded locking device, operated by a lever with a handle which protruded from the upper surface of the tow bar. The locking lever passed through apertures in the upperside of the tow bar, plunger and underside of the tow bar. When the lever was maintained in that position by means of pressure from the spring, it locked the plunger in the forward position. The plunger ceased to be locked when the locking handle was pulled upward against its spring and when the handle was pulled horizontally backward the plunger moved back against its spring. When the locking handle was released, it automatically moved forward and down with a click, securing the plunger in the forward position when the ball-unit was completely in or out of the socket. The mechanism was designed to ensure that when the socket was pressed fully over the ball-unit and the locking handle released, the ball-unit and socket were unable to come apart. The end of the trailer to which the tow bar was attached was the heavier, giving to the tow bar a downward thrust. The strength of two or three men was required to lift the tow bar socket over the ball-unit.

On November 18, 1959, while the appellant was in the driving seat of the motor-lorry at the Clarence Pier Amusement Park, two men coupled the trailer to the lorry by means of the tow bar mechanism. The appellant then uncoupled the vehicles and greased the ball-unit. When the vehicles had been recoupled by means of the tow bar mechanism the appellant drove out of the amusement park making a left-hand and a right-hand turn in so doing. The surface of the amusement park was bumpy in places. The appellant drove the lorry and trailer along two roads, one of which had a bumpy surface and one a smooth surface. When near the junction with another road, the trailer became disconnected from the towing vehicle, swerved towards the nearside kerb and then across the road where it collided with an oncoming motor-cycle combination, resulting in the death of the motor-cyclist, injury to a pillion passenger and extensive damage to the machine. After the collision the motor-lorry was found stationary on the north-western side of the road, approximately 50 yards north-east of the caravan. There was no apparent defect in the tow bar and ball-unit. A police mechanic testified before the justices that when he examined the ball and socket mechanism he found them to be in excellent condition and was unable to express any opinion as to how it parted. When he examined the mechanism he found nothing wrong with it: why it parted was a complete mystery. It was possible that the coupling was defective but if that was the reason he had not been able to find what defect there was in it. Another possible reason was some unnatural force which would give a lift and twist—if the caravan ran over a deeply submerged manhole cover that could produce it, or if there were half a brick in the road that might do it. The possibility of unnatural force could not be reasonably left out of the accident. Vibration would not undo the locking device, which had a fairly strong spring.

Counsel for the appellant made a submission of no case but the justices found that there was a case to answer.

Both the appellant and his servant gave evidence as to the coupling of the two vehicles at the amusement park.

It was contended by the appellant that the accident may have resulted from any one of the following causes: defective mechanism of the tow bar, due to lack of maintenance; incorrect coupling of the vehicles; some unnatural force due to the trailer passing over a brick or similar object which wrenched the tow bar from the ball-unit; defective manufacture or design of the tow bar; that because Part III of the regulations of 1955 related solely to the maintenance of parts and accessories of motor-vehicles and their construction was governed by Part II, it was essential that the court should find that the defective coupling of the vehicles was not due to the construction of the tow bar and such an inference could not be drawn from the evidence. In the event of the court drawing such an inference, the evidence did not support a finding that the defective coupling was due to (1) lack of maintenance, or (2) incorrect coupling. In the event of the court drawing an inference that the vehicles were incorrectly coupled, regulation 73 did not relate to a matter of that kind but (save where the conditions of loading were specifically mentioned) solely to the maintenance of the vehicle and trailer in good and roadworthy condition. Regulation 73 did not impose absolute liability and where the evidence did not disclose the cause of the defect it was impossible for the court to find that danger was likely to arise from such unknown cause.

It was contended by the respondent that regulation 73 should not be construed as relating solely to mechanical maintenance by reason of the absence of the word "maintained" therein and in the heading to Part III of the regulations: that the heading to regulation 73 was not a part of the regulation and a distinction should be drawn between regulation 73 and the subsequent regulations in which the words "be maintained" appeared.

The justices were of opinion that an inference could reasonably be drawn from the evidence that there was a likelihood of danger arising to persons on the trailer or on the road by reason of the condition of the tow bar, causation being a matter which was not material to the proof of the charge; that demeanour and conflicting statements of the appellant and his witness, however (each maintained that he had personally performed the final act of coupling), viewed in the light of the evidence that the tow bar was of common and obviously efficient design, of a type in daily use throughout the country and apparently in excellent condition, led them to the conclusion that its dangerous condition arose from the failure of the person who manipulated the parts to ensure that they were properly engaged and locked. They directed their minds to the distinction to be drawn between the construction of vehicles as governed by Part II of the regulations and their use as governed by Part III when considering the contention of the appellant that because of that distinction it was essential for them to be satisfied that the defective coupling of the vehicles was not due to the construction of the tow bar. They would have accepted that contention had the tow bar been governed by Part II of the regulations. It was clear, however, that that Part did not exhaustively govern the construction of all parts and accessories of every motor-vehicle and trailer drawn thereby and did not deal with the construction of a tow bar. If that contention were correct, it would follow that no provision existed for preventing the use on roads of motor-vehicles and trailers when danger was likely to arise from the condition, due to their construction, of parts and accessories which were not within the limited scope of Part II of the regulations. They were unable to accept that contention and took the view that regulation 73 (1) applied to such use. The contention made on behalf of the appellant that in its application to the condition of motor-vehicles, trailers, their parts and accessories, regulation 73 (1) related solely to mechanical maintenance was based on the wording of the heading to regulation 73 and the headings and wording of regulations 74 to 78 which dealt with maintenance of parts. They were of opinion that those headings were equivalent to marginal notes in a statute and need not be regarded as they formed no part of the regulations. They took the view that the heading to Part III of the regulations was the heading which governed the general construction of regulations 59 to 105. The words "be maintained" appeared in regulations 74 to 78 and the omission of such words from regulation 73 confirmed them in the opinion that in its application to the condition of motor-vehicles, trailers, their parts and accessories, it should be read as applying only to mechanical maintenance. If they were to hold otherwise, it would follow that there was no provision dealing with circumstances where danger was caused or was likely to be caused by the incorrect or careless use of parts which were properly maintained. They were therefore of the opinion that to construe regulation 73 (1) so as to allow an avenue of escape to those responsible for dangerous situations arising from that source or from the construction of parts which were not included in Part II of the regulations, would be contrary to the intention of the legislature and the object of the regulations. It was not beyond the bounds of possibility that the accident was caused by the application upon the tow bar of some unnatural force, such as that which would result from the trailer passing over a deeply submerged manhole cover or half of a brick, of which the driver was unaware, but they took the view that the tow bar should be so designed, constructed and maintained as to resist the stress and strain arising from the force suggested, the application of which would not, in their opinion, be an unnatural event upon a road. If, however, through circumstances beyond the appellant's control, the part in question had been subject to a force which it could not reasonably be expected to withstand (an example of which would be suffering an impact with another vehicle travelling at

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speed) leading ultimately to the disconnection of the trailer, they would have felt that other considerations applied, involving the question whether, after the impact, there was a "use" within the meaning of the regulations. They had no evidence of the application of a force of that nature and it appeared to them to be unnecessary to consider the law applicable to such an eventuality. They were of opinion that regulation 73 (1) should be construed literally and that it was an absolute prohibition against the use on a road of a motor-vehicle or trailer, a part or accessory of which was in such condition whereby danger was caused or was likely to be caused to a person on the vehicle or trailer or on a road, regardless of whether the dangerous condition arose from construction which was not governed by Part II of the regulations, lack of proper maintenance, the incorrect or careless use of parts, or, in the present case, the application to the tow bar of the force to which the appellant's counsel referred. They convicted the appellant, who appealed to the Divisional Court.

R. G. Rougier for the appellant. Regulation 73 on its proper construction is aimed at the maintenance of motor-vehicles and trailers and all their component parts. Here there was no evidence of lack of maintenance and accordingly no evidence on which the justices could find the case against the appellant proved. If that submission be upheld, that is an end of the case because there was no defect in the tow bar mechanism. The regulations must be looked at as a whole. There is a clear distinction between those in Part II which concern the construction of vehicles and those in Part III which apply to user: *Cole* v. *Young*,[2] *per* Lord Hewart C.J.,[3] and *Vinall* v. *Howard*.[4] In the latter case Somervell L.J.[5] put the difference between Parts II and III of the regulations in a nutshell. It was admitted here that there were a number of possibilities which could have led to the trailer becoming detached.

[Lord Parker C.J. If the justices' inference is right and the appellant did fail to couple the trailer and lorry properly, why does that not come within the scope of regulation 73?]

One must read the word "maintenance" into the words of the regulation. "Maintenance" means keeping in a good state of repair: see *Latimer* v. *A.E.C. Ltd.*,[6] *per* Singleton L.J.,[7] who upheld the meaning given to maintenance by Pilcher J. If that were not so, startling results might follow. If a car admitted to be in an excellent mechanical condition were parked on a slope with the brakes not properly applied it would be repugnant to good sense to say that the car was in a dangerous condition under regulation 73. Under the regulation the prohibition against use in a condition to cause danger is absolute, but it is submitted that the words of the regulation mean that one must not use a vehicle which is not maintained properly. The justices were not entitled to draw the inference that these vehicles were not properly maintained even if there was evidence that they were not properly coupled. The words of the regulation read in vacuo are so wide that some limitation must be put upon their meaning. That can be done by reference to the heading covering regulation 73. The word "maintenance" does not bear such a wide meaning that it can cover a failure to couple up two vehicles.

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[2] [1938] 4 All E.R. 39, D.C.

[3] Ibid. 41.

[4] [1954] 1 Q.B. 375; [1954] 2 W.L.R. 314; [1954] 1 All E.R. 458, C.A.

[5] [1954] 1 Q.B. 375, 381.

Michael Lee for the respondent. The appellant's contention that the justices' decision was wrong is based on the meaning he gives to the word "maintenance," for which he relies on *Latimer's* case,[8] but there is no justification for confining the meaning of "maintenance" in the way he suggests. In *Latimer's* case [8] the court was considering the meaning of "maintenance" in section 25 of the Factories Act, 1937, but that Act contains a definition section in which "maintenance" is given two other meanings, namely, maintained in efficient state, in efficient working order: see section 152. It is submitted that "maintained" merely means "kept." It cannot mean anything else. The mischief at which regulation 73 is aimed is to prevent vehicles with faulty parts coming onto the roads and causing danger. The meaning of "maintain" cannot be limited in such a way as to enable a person summoned for an offence under regulation 73 to escape by calling a mechanic to say that the vehicle has been properly maintained. It is admitted that Part III of the regulations deals with use and not with the construction of the vehicles in question. When considering the application of regulation 73 one must look at the condition of the parts when they are actually being used: *Andrews* v. *Kershaw Ltd.*[9]; *Cole* v. *Young*.[10] A summons under Part II of the regulations would not have been appropriate here because it could not be said that the tow bar mechanism was a bad piece of construction That was clear from the evidence of the police officer who could find no fault with it. But it did come apart. That could only have been due to one of two possibilities, either unnatural force, or failure by the appellant to put the two parts into efficient working order. When considering the two parts of the tow bar mechanism in relation to their use on the road neither part has any purpose unless they are put together, therefore they cannot be looked at apart. The motor-lorry with the tow bar and socket and the trailer with the ball-unit were not, in regard to the use made of them on the road, in efficient working order but in an inefficient condition where the ball-unit rested on the socket in a state of uneasy balance. The justices were right in finding that that caused them to come apart.

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[6] [1952] 2 Q.B. 701; [1952] 1 T.L.R. 1349; [1952] 1 All E.R. 1302, C.A.

[7] [1952] 2 Q.B. 701, 710.

[8] [1952] 2 Q.B. 701.

[9] [1952] 1 K.B. 70; [1951] 2 T.L.R. 867; [1951] 2 All E.R. 764, D.C.

[10] [1938] 4 All E.R. 39.

[Salmon J. Regulation 73 contemplates two vehicles being on the road together. One must consider the words " drawn " thereby."]

If the regulation does not contemplate the two vehicles being used together the words " drawn thereby " would have no meaning. It would be an absurd result to allow this one part, the tow bar, to escape from regulation 73. Why should it be regarded as an idle still piece of metal? When a trailer is drawn by another vehicle the two become one vehicle. Every part must be efficient; that includes the tow bar mechanism by which the trailer is drawn. It must be assumed that the two parts were not properly coupled. Therefore they were not in an efficient state.

Rougier in reply. As to the meaning of " maintenance," this is a penal regulation and no wider meaning should be put on it than its words allow. The summons referred to a defect in the tow bar and no defect was found. There was no single part of either the lorry or the trailer to which the prosecution could point and say that it was not maintained in good order. The prosecution seeks to read into regulation 73 some provision that the two vehicles should be regarded as one, but one cannot read such an inference into the regulation. To do so would be straining the words beyond their plain ordinary meaning.

Lord Parker C.J. stated the facts and continued: How the accident came to happen was in many respects rather a mystery. There was evidence that there was no apparent defect in the

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tow bar and the ball-unit. That was found by the justices to be so. Accordingly, therefore, so far as construction was concerned, the two units forming the connection were of good construction.

So far as maintenance was concerned, in the sense of being in good repair, again there was evidence that the two units were in good repair. The only other two theories were either that there had been some unnatural force or bump which had caused the coupling to disengage, or that the appellant or his servant in fixing the tow bar on to the ball-unit, had somehow not caused the ball-unit to get home into the socket but had merely caused a connection sufficient to enable the trailer to be towed for some distance along the road. The police evidence was that in effect it was a mystery.

The justices found, albeit in part of their opinion, that it was the fault of the person who had effected or tried to effect the coupling. They said this: "The demeanour and conflicting "statements of the appellant and his witness, however (each "maintained that he had personally performed the final act of "coupling), viewed in the light of the evidence that the tow bar "was of common and obviously efficient design, of a type in daily "use throughout the country and apparently in excellent condi-"tion, led us to the conclusion that its dangerous condition arose "from the failure of the person who manipulated the parts to "ensure that they were properly engaged and locked."

The first point taken in this appeal is that that was not a finding which justices properly directing themselves could on the evidence have arrived at. I find it unnecessary to go through that evidence. It is enough to say that in my judgment there was evidence upon which they could properly come to that conclusion of fact, and I see no ground on which the court could possibly interfere with that finding.

The next question is whether in those circumstances there has been a breach of regulation 73 of the Motor-Vehicles (Construction and Use) Regulations, 1955. Part II of those regulations, which covers regulations up to and including regulation 58, is headed: "Regulations governing the construction, weight, and "equipment of motor-vehicles and trailers," and I think it is clear that those are regulations which apply, at any rate primarily, to the manufacturer or, if the vehicle is altered or reconstructed, the adapter. But beginning with regulation 59, up to and including regulation 106, there comes Part III, which is headed: "Regulations governing the use on roads of motor-vehicles and "trailers," and regulation 73 up to and including regulation 79, being part of the regulations in that Part III, is dealing with what is called maintenance. [His Lordship read regulation 73 (1) and continued.] Pausing there, I think it is clear in this case and, indeed is so found, that if the condition of the motor-vehicle or the trailer or the parts or accessories thereof were at fault, there clearly was a condition of affairs where danger was likely to be caused to a person on the road. The sole question, therefore, is what is meant by saying: "Every motor-vehicle, every "trailer drawn thereby and all parts and accessories of such "vehicle and trailer shall at all times be in such condition . . . "that no danger is caused or is likely to be caused to any "person. . . ."

Mr. Rougier, on behalf of the appellant, has submitted in this connection that the word "maintenance" there, and as used in this group of sections, is really dealing with repair, that it is merely providing that vehicles and their parts should be kept in good repair. On that basis, it is undoubtedly true that both the trailer and its parts and the motor-vehicle and its parts were at all times in good repair. On the other hand, the respondent's contention is that there is no reason in this connection to give "maintenance" that narrow meaning, and that it should be given a meaning, which is certainly not inapt in many connections, of providing that the vehicle should not merely be in good repair but in efficient working order or in an efficient state. That is the meaning given to "maintenance," albeit by definition, in the Factories Acts, and when one is considering the mischief aimed at by this regulation it is proper, so runs the argument, that it should be given this wide meaning. I see no reason why "maintenance" should be confined to keeping in good repair and I would give it the wide meaning contended for.

Next, it is said that once one finds these two vehicles being used on the road, the motor-lorry pulling the trailer, there were parts of each forming the coupling which were not in an efficient state, as the result, as the justices find, of the person who coupled them not making a secure coupling. It seems to me that that is something which comes within this regulation. If I may read the opening words once again and somewhat elaborate them, they read: "Every motor-vehicle and every trailer drawn thereby and "all parts and accessories of such vehicle"—and I will interpose—"and trailer drawn thereby shall at all times be in such "condition." It seems to me that once this motor-lorry was

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drawing this trailer a state of affairs arose when under this regulation both the tow bar of the trailer and the ball-unit on the motor-lorry should have been in an efficient state or working order. Quite clearly, if they were improperly joined together each part was not in efficient working order. Accordingly, I think on that ground and that ground alone the justices were right in their determination. They in fact decided this case on the basis that it did not in their view matter whether the dangers that then arose were the result of construction or undue force being exercised through the state of the road, or failure to make a secure coupling. For my part I think their decision was justified on the ground that their finding of carelessness or failure to make a secure coupling is within the regulation, and it is unnecessary to deal with the other grounds on which they sought to justify the conviction.

SALMON J. I agree. I have come to the clear conclusion, as expressed by my Lord, that the appeal should be dismissed.

WINN J. I also agree. In my view regulation 73 relates to the condition of the various articles referred to in it and has no relevance when considering whether or not injury has arisen by lack of proper maintenance. I am fortified in that view by the terms of subsection (3) because it is quite impossible to refer those terms to any system of maintenance. One would have to read the subsection as though there could be inserted such words as "through lack of proper maintenance."

I agree with both the judgments which have been delivered and would dismiss this appeal.

Appeal dismissed with costs.

Solicitors: *R. I. Lewis & Co.; J. R. Haslegrave, Town Clerk, Portsmouth.*

E. M. W.

CAMPBELL DISCOUNT CO. LTD. *v.* GALL.

C. A.

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March 1, 2.

Holroyd Pearce, Harman and Davies L.JJ.

[Plaint No. QO 254.]

Hire-Purchase—Hire-purchase agreement—Agent, whether dealer—Blank form signed by hirer—Agreement by hirer with dealer for hire-purchase price within statutory protection—Contract form filled up by dealer for price outside statutory protection—Deposit paid to dealer—Whether agreement enforceable—Whether parol evidence admissible to prove true nature of transaction—Status of dealer in hire-purchase agreement — Whether hirer estopped by negligence — Hire-Purchase Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 53), *ss.* 2 (1) (2), 5 (*e*).

Hire-Purchase—Agency—Whether dealer agent—Blank form signed by hirer—Filled in by dealer.

Estoppel — Conduct, by — Negligence — Motor-car — Hire-purchase — Blank form signed by hirer—Form filled up by dealer for price outside statutory protection—Whether hirer estopped by negligence.

Contract — Construction — Extrinsic evidence — Hire-purchase — Evidence to show true nature of transaction.

The defendant agreed with a car dealer to buy a car on hire-purchase terms for £265. He paid a deposit of £65, understanding that repayment of the balance would be by weekly instalments of £2. He then signed the hire-purchase agreement form of the plaintiff finance company provided by the dealer, leaving the dealer to fill in the details. The dealer, whether by mistake or fraud, filled in a false price of £325 and terms for monthly instalments of £13. The finance company accepted the transaction and sent the defendant a copy of the agreement. The defendant, according to evidence given at the subsequent trial, informed the company by letter and telephone that the copy agreement did not represent the contract he had made; and he refused to pay any instalments and did not use the car. The company took back the car and sued him for £52, representing four instalments. The defendant claimed that the agreement was void since it was for an amount less than £300 and, accordingly, within the protection of the Hire-Purchase Acts, 1938 [1] and 1954, and that it did not comply with the requirements of section 2 of the Act of 1938; and he counterclaimed for the return of his deposit:—

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[1] Hire-Purchase Act, 1938, s. 2: "(1) Before any hire-purchase agreement is entered into in respect of "any goods, the owner shall state in "writing to the prospective hirer, "otherwise than in the note or memorandum of the agreement, a price "at which the goods may be purchased by him for cash (in this "section referred to as the 'cash "'price'): Provided that this subsection shall be deemed to have been "sufficiently complied with—(*a*) if "the hirer has inspected the goods or "like goods and at the time of his "inspection tickets or labels were "attached to or displayed with the "goods clearly stating the cash price, "either of the goods as a whole or "of all the different articles or sets "of articles comprised therein, or "(*b*) if the hirer has selected the "goods by reference to a catalogue, "price list, or advertisement, which "clearly stated the cash price either "of the goods as a whole or of all "the different articles or sets of "articles comprised therein. (2) An "owner shall not be entitled to "enforce a hire-purchase agreement

Held, (1) that the dealer was not the agent of either the hirer or the finance company (post, pp. 441, 442).

(2) That the question whether the written document was enforceable against the hirer or was void depended on an examination of the true nature of the transaction; and for that purpose parol evidence was admissible in a case which involved the Hire-Purchase Acts, since those Acts, like the Bills of Sale Acts and the Rent Acts, could not be excluded by documents which, though purporting to be outside the Acts, represented a transaction which was in truth within their ambit (post, p. 439).

(3) That the parol evidence here showed that the true bargain was one within the Acts and, as it did not comply with the statutory requirements, it was void and unenforceable by the company unless the hirer was estopped by his own negligence in signing the form in blank, from asserting as against the company that the written document was not his agreement.

(4) That the hirer was not estopped from denying the truth of the written document for he owed no duty of care to the finance company, and the doctrine of estoppel by negligence applied only to negotiable instruments (post, p. 443).

Accordingly, there was not and never had been any agreement between the hirer and the company on which they could sue him for the instalments; but, for the same reason, he could not recover from the company the deposit paid to the dealer, since it was not referable to any contract with the company.

Per Holroyd Pearce L.J. It is doubtful whether an agreement which is unenforceable under the Hire-Purchase Acts can by estoppel be rendered valid and enforceable (post, p. 443).

Wilson and Meeson v. *Pickering* [1946] K.B. 422; 62 T.L.R. 223; [1946] 1 All E.R. 394, C.A. applied.

Eastern Distributors Ltd. v. *Goldring* (*Murphy, Third Party*) [1957] 2 Q.B. 600; [1957] 3 W.L.R. 237; [1957] 2 All E.R. 525, C.A., and dictum of Diplock J. in *Lowe* v. *Lombank* [1960] 1 W.L.R. 196, 206; [1960] 1 All E.R. 611, C.A. distinguished.

Appeal from Judge Nicholas sitting at Lambeth County Court.

The facts, as stated by Holroyd Pearce L.J., were as follows: The defendant, Gall, was introduced to one Boodof, the manager of a firm, Windsor Autos, which dealt in motor-cars. He believed that Boodof was a dealer on his own. He

"... unless ... (*a*) a note or "memorandum of the agreement is "made and signed by the hirer and "by or on behalf of all other parties "to the agreement ..."

S. 5: "Any provision in any "agreement— ... (*e*) whereby an "owner or seller is relieved from "liability for the acts or defaults of "any person acting on his behalf in "connection with the formation or "conclusion of a hire-purchase agreement or credit-sale agreement, shall "be void."

agreed with Boodof to buy a secondhand Vauxhall car for £265 on hire-purchase terms. The defendant paid a deposit of £65 in cash to Boodof. Unfortunately, at Boodof's request the defendant signed one of the forms of hire-purchase contract of the plaintiff company, Campbell Discount Company Ltd., leaving the blanks unfilled for Boodof to complete. Clause 12 of the printed agreement provided that "the vendor is not the "owners' agent and the owners are not in any way responsible "for and shall not be bound by any representation made by the "vendor."

The defendant had been told by Boodof and expected that he would have to pay a further £200 by instalments not exceeding £2 per week spread over a period of 18 months to two years. Boodof inserted into the uncompleted hire-purchase agreement a false purchase price of £325. He also inserted into the hire-purchase agreement a provision that repayment was to be by 24 monthly instalments of £13 per month. He gave similar false particulars on the sales note. He sent the requisite documents to the plaintiff company, who bona fide accepted the transaction, and paid Boodof for the motor-car. The car was delivered to the defendant, but he never used it. Shortly thereafter the company sent him a copy of the agreement. The defendant said in evidence that he complained by letter and telephone that both the price and the instalments were too high, but the plaintiff company had no record of such a letter or telephone conversation.

In due course the company took possession of the car and sued the defendant for four monthly instalments—£52. The defendant, by his defence, contended that he had never agreed to hire the car on the terms set out in the copy agreement or on any terms save those agreed with Boodof, and that the terms on which the company claimed had been inserted in the agreement without his knowledge or consent. He claimed further that he would rely on the provisions of the Hire-Purchase Acts, 1938 and 1954, and in particular on section 2 of the Act of 1938, in that there had been breaches of the requirements (i) to state in writing to the defendant the cash price of the goods; and/or (ii) that he never made and signed a memorandum of the hire-purchase agreement, in that the memorandum signed by him was so signed in blank and did not contain a statement of the hire-purchase price or the cash price or any of the particulars required by subsection (2) (*b*) of section 2; and/or (iii) that the notice referred to in subsection (2) (*c*) had not been completed by the insertion of the requisite amounts; and/or (iv) that the copy agreement was not sent to him within seven days of the agreement. He claimed further that the plaintiff company had wrongfully repossessed the car contrary to section 2 (2) of the Act of 1938; and he denied that he was indebted to the company in the whole or any part of the sum claimed or that the agreement was enforceable against him. By a counterclaim he claimed, inter alia, the return of the £65 deposit paid by him to Boodof under the purported agreement.

On June 26, 1960, the county court judge gave judgment for the plaintiff company. He made no finding as to whether the defendant had communicated by letter or telephone with the plaintiff company; but he found that the defendant had clothed Boodof with authority to complete the form and by mistake or fraud Boodof had gone beyond what he was trusted to do; that the defendant's signature had his apparent authority; and that therefore the defendant was bound by the agreement, so that his only remedy was damages against Boodof and not against the plaintiff company. Accordingly, he gave judgment for the company and dismissed the counterclaim. The defendant appealed.

Denis R. M. Henry for the hirer. The agreement sued on is not enforceable, because (1) it was not the agreement entered into by the hirer; and (2) the true agreement was within the Hire-Purchase Acts and there is no sufficient note of it as required by section 2 (2) (*a*) of the Act of 1938.

As the price orally agreed was less than £300 and so within the protection of the Acts, while the false price filled in on the form was outside their protection, the first question is whether the court will look behind the document to the true bargain. The Acts are for the protection of the hirer against, inter alia, his own folly, and require that he shall realise the true terms of the bargain. The effect of the Acts on the true bargain in this case is to render unenforceable an agreement signed in blank: *Eastern Distributors Ltd.* v. *Goldring* (*Murphy, Third Party*), *per* Devlin J.[2] If the court decides to look at the true transaction and the impact of the Acts on it, the further question arises whether the hirer is estopped by his own negligence from denying the written transaction. On the authorities, there was not here sufficient negligence to create an estoppel, for the hirer owed no duty of care to the finance company. Further, the proximate cause of the loss was the dealer's fraud or mistake and not the hirer's negligence: *Swan* v. *North British Australasian Co. Ltd.*[3] Moreover, the rule as to estoppel by negligence applies only to negotiable instruments filled in "in blank": *Wilson and Meeson* v. *Pickering*, *per* Lord Greene M.R.[4] The court may also consider that estoppel ought not to run so as to defeat the intention of the Acts.

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[2] [1957] 2 Q.B. 600, 612; [1957] 3 W.L.R. 237; [1957] 2 All E.R. 525, C.A.

The county court judge considered that the question as to which of these two innocent parties should suffer through the acts of a fraudulent or mistaken dealer turned on the principles of agency and the question as to whose agent the dealer was; and he was impressed particularly by clause 12 of the hire-purchase agreement, which exempts the company from any liability for representations by the "vendor." On the question of agency, this dealer was acting "in connection with the formation or conclusion of a hire-purchase agreement" within the Hire-Purchase Acts, and accordingly clause 12 is void by virtue of the provisions of section 5 (*e*) of the Act of 1938.

The following acts done by the dealer on behalf of the company support the contention for the hirer that the dealer was acting as the agent of the company: (1) he had authority to decide the price; (2) he offered the rates of repayment; (3) he was the agent of the company to do a number of things which have to be done to comply with section 2 of the Act, and which, if not done, may render the agreement unenforceable by the company; the company relied on the dealer to do those things; (4) he received the initial deposit on behalf of the company under clause (1) of the agreement, and (5) he received commission on the transaction. *Lowe* v. *Lombank*[5] is distinguishable from the present case in a number of respects, but it is cited for the dictum of Diplock J.[6] that a company may be bound by a representation in a document even though it has not accepted the offer of the hirer. Finance companies have no business save through dealers; they supply their forms to selected dealers; and this dealer was authorised to proffer the form of this company to this hirer. The dealer was not the hirer's agent armed with express or ostensible authority to make the contract in the written document. The company had no knowledge that the dealer was filling in the form and never thought that he had authority to fill it in, so that there was no holding out by the hirer of the dealer as his agent.

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[3] (1863) 2 H. & C. 175, Ex.Ch.

[4] [1946] K.B. 422, 427; 62 T.L.R. 223; [1946] 1 All E.R. 394, C.A.

[5] [1960] 1 W.L.R. 196; [1960] 1 All E.R. 11, C.A.

[6] [1960] 1 W.L.R. 196, 206.

On the counterclaim for the return of the deposit, the dealer received it on behalf of the company and therefore it is recoverable from the company.

Oliver Martin for the company. As a preliminary point, though parol evidence may be admitted to show fraud or that a contract is invalid for mutual mistake or in some other way, it cannot be adduced in this case to show that a complete stranger to the contract was fraudulent or mistaken unless non est factum is pleaded, and there is no such plea here.

[HOLROYD PEARCE L.J. The Hire-Purchase Acts are not to be avoided by what people write on paper, and the court will not exclude parol evidence as to the true transaction because of a technical rule of evidence.]

But there never was an agreement within the Acts. There was nothing more than an instruction by the hirer to the dealer to fill in the proposal form with certain figures which, if accepted, would bring the transaction within the Acts. The only agreement is that which is written and is outside the Acts; and the question is whether the hirer can adduce evidence to vary it so as to bring it within the Acts.

[DAVIES L.J. He is not seeking to vary it; he is simply saying that he never made that agreement at all.]

If the dealer merely put down the wrong words on the paper, that was a unilateral mistake which is not enough to vitiate the contract.

[HARMAN L.J. But the contract, if ever there was a contract, came into existence by a process of offer and acceptance, and the hirer never offered to purchase a car at more than £265 over a deferred period.]

If the dealer was the hirer's agent, the hirer made the offer by giving the blank document signed by him to the dealer, and he cannot be heard to say that it is not his document. There is no authority for the view that the Hire-Purchase Acts provide an exception to the general rule as to parol evidence.

The dealer was the agent of the hirer, for the hirer gave him express authority to fill in the form and submit it to the company; a principal is bound by the acts of an agent who acts within the terms of his express or ostensible authority, even if the agent is fraudulent or mistaken.

[HOLROYD PEARCE L.J. There was no ostensible authority to fill in a price of £325, even if there was actual authority to fill in the price of £265.]

The hirer in a hire-purchase transaction requires money from a finance company, and he enters into a contractual relationship with the company through the agency of the dealer to whom he says: "Complete the form and place it before the company on "my behalf."

[HOLROYD PEARCE L.J. Three parties want this transaction. Why should the dealer be acting for the hirer any more than for the company?]

He is acting in his own interest because he wants the business; but in this case the only contract between the dealer and the hirer was a contract of agency. By putting the document signed "in blank" into the dealer's hands, the hirer clothed him with an instrument and held it out as the true contract. *Eastern Distributors Ltd.* v. *Goldring* (*Murphy, Third Party*)[7] is relied on, for there, as here, the dealer was given a limited authority to carry out a particular transaction and exceeded that authority. The court there decided that there was a holding out. In that case, as in this, the hirer had a good action against the dealer but he remains liable to the company. From the company's point of view they are entitled to assume, when they receive a form filled up and signed by the hirer, that it is a valid agreement, for it is one on which they have to pay out a large sum of money.

[HOLROYD PEARCE L.J. That might support estoppel by negligence, but the authorities cited are against that argument. If agency cannot be established, estoppel by negligence cannot succeed.]

On the counterclaim, if the court holds that this was not a valid agreement, the deposit cannot be recovered from the company, though the hirer might recover it from the dealer. The company has after all received a car which has greatly depreciated in value, and has suffered a loss.

Henry in reply. On the preliminary objection as to the admissibility of parol evidence to show the true bargain, see Cross on Evidence (1st ed., pp. 474, 477 and 478) that parol evidence may be used to show, inter alia, that a written contract was signed subject to a condition precedent. The condition precedent to the completion of this form was that it would be filled in for £265. [*Polsky* v. *S. & A. Services*[8] was referred to.]

On the return of the deposit, it is apparent from what actually happened in this case and from the sales note that the company

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[7] [1957] 2 Q.B. 600.

[8] [1951] 1 All E.R. 185.

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had the benefit of the £65 deposit, and it does not assist the company to say that the car was not worth it, for they were prepared to accept it at the dealer's valuation.

HOLROYD PEARCE L.J. This is a defendant's appeal from a judgment of Judge Nicholas who held that he was liable to pay certain instalments under a hire-purchase agreement, and dismissed his counterclaim for the return of a deposit of £65. The defendant contends, first, that the judge erred in that no agreement was ever made between the plaintiff company and the defendant. Secondly, he argues that if such an agreement was made, it was not enforceable since there was no sufficient note or memorandum of the agreement under section 2 (2) (*a*) of the Hire-Purchase Act, 1938.

The case involves the question whether the loss occasioned by the fraud (or just conceivably the mistake) of a motor-car dealer falls to be borne by the defendant or the plaintiff finance company. [His Lordship stated the facts as set out above, and continued:] The defendant contends that he never agreed to the hire-purchase agreement now sued on, and since the total hire-purchase price under the real agreement was less than £300 the transaction comes within the Hire-Purchase Acts, and is unenforceable owing to certain breaches of the statutory requirements. He counterclaims for the £65 deposit paid under the purported agreement made with Boodof. The question is whether the defendant is bound by, and also whether the plaintiff company can enforce, the hire-purchase agreement which by its terms is outside the Act since the total hire-purchase price thereunder is over £300 when in fact the true bargain that the defendant himself made was within the Act. If the Act is applicable there was plainly a failure to comply with section 2 (2) (*a*), since the signature by the hirer of the agreement in blank does not satisfy the statutory requirement: *Eastern Distributors Ltd.* v. *Goldring* (*Murphy, Third Party*).[1]

The position of Boodof, vis-à-vis the parties, is of vital importance. There are three possibilities: (1) that Boodof was the plaintiff company's agent either by authority or by estoppel; (2) that he was the defendant's agent by authority or by estoppel; and (3) that he was not the agent of either party.

Both counsel have put their arguments very clearly and fairly. Mr. Henry puts forward as his main contention the proposition that Boodof was the agent of the plaintiff company. If that be right, the defendant must succeed, for he made an oral agreement with the plaintiffs through their agent, and that agent fraudulently (or just conceivably by mistake) filled in the form so that it purports to embody an agreement that was never in fact made. In that event, quite apart from the Act, they cannot successfully sue on the agreement produced. Their attempt to do so is a repudiation of the original oral agreement, with the result that the deposit becomes repayable to the defendant.

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[1] [1957] 2 Q.B. 600, 612; [1957] 3 W.L.R. 237; [1957] 2 All E.R. 525, C.A.

Mr. Martin took the preliminary point that parol evidence is not admissible to show that the written agreement is other than it appears to be. I do not think that point is good. It was not put forward on a cross-notice, and therefore Mr. Henry was taken by surprise and has not had time to deal with the matter fully. Had we been against him on this point we must have granted him an adjournment. "Parol evidence cannot "be received," to use the words of Lord Morris in *Bank of Australasia* v. *Palmer*,[2] "to contradict, vary, add to or subtract "from the terms of a written contract, or the terms in which "the parties have deliberately agreed to record any part of their "contract." But parol evidence can be used to show whether a written contract is void for mistake—see cases cited in Cross on Evidence (1st ed., p. 477)—or was signed subject to a condition precedent. Moreover, in certain cases parol evidence is admissible when it is relevant for the court to find the true nature of the transaction.

The Hire-Purchase Act, like the Bills of Sale Acts and the Rent Acts, cannot in my judgment be excluded by documents which, though purporting to be outside the Act, represent a transaction which is in truth within it. Under the two latter Acts parol evidence has always been admissible to show the true nature of a written transaction which appears to satisfy or exclude the Act although that evidence varies or contradicts the documents. Such evidence is admissible here for the purpose of showing that the true bargain was within the Hire-Purchase Act (although the written document is outside it) unless the defendant is estopped from so contending. But even if Boodof was the defendant's agent, I feel considerable doubt whether the Act can be excluded by such an estoppel.

Clause 12, on which the judge relied, says that the dealer is not the agent of the hire-purchase company, and that they are not in any way responsible for, and shall not be bound by, any representations made by such vendor. If in truth this transaction comes within the Act, then the provisions of section 5 (*e*) apply, and "Any provision in any agreement— . . . (*e*) whereby "an owner or seller is relieved from liability for the acts or "defaults of any person acting on his behalf in connection with "the formation or conclusion of a hire-purchase agreement or "credit-sale agreement, shall be void." If, therefore, Boodof was acting for the hire-purchase company, clause 12 of the hire-purchase agreement would be void. But that still leaves the question intact whether he was in fact so acting.

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[2] [1897] A.C. 540, 545, P.C.

The following facts are said to show that Boodof was acting as agent for the hire-purchase company. First, it is said, he decided what the total price and what the rates of repayment were to be. But in my view that was not a decision by Boodof on behalf of the hire-purchase company; it was merely Boodof's definition of the proposition which he proposed to put up to the company. Then it is said that the dealer receives a commission on this transaction from the hire-purchase company; but that in my view is no indication that he was, before the transaction became effective, the agent of the hire-purchase company.

Reliance was placed on section 2 of the Hire-Purchase Act which provides that the owner shall state in writing what is the price of the goods to be hired; and it is argued that since the price of these goods was given to the defendant by Boodof, he must have been the hire-purchase company's agent for that purpose. But the proviso to section 2 shows that if the hirer has accepted the goods, and the price is shown on the goods, the requirements of section 2 (1) shall be deemed to be satisfied. So in my view there is nothing in that section which compels the plaintiff company to do something through the agency of the dealer. Unless certain things have been done by the dealer the agreement is unenforceable, but that does not constitute the dealer their agent.

Then it is said that the dealer receives the initial rental on behalf of the hire-purchase company. That is a matter which becomes very relevant on the consideration of the counterclaim; but in my judgment the position cannot be said to be so clear as to throw any light on the position of Boodof for the purpose of deciding whether he was the company's agent. It is true that the documents act on the assumption that if the hire-purchase agreement becomes effective, the money paid to the dealer shall be a payment of rent under that agreement to the hire-purchase company. But at the stage which we are considering, the agreement had not become effective, and it cannot be said that Boodof was receiving the deposit as agent for the hire-purchase company. For the hire-purchase company were not then concerned at all. They were wholly ignorant of the transaction. Undoubtedly Boodof was receiving the initial payment in order to hold it and give credit to the hire-purchase company for it if and when it accepted the transaction; but there was no certainty that they would accept it. The dealer had no general agreement with the hire-purchase company, and no general course of dealing with them. They had had some previous transactions with his firm, Windsor Autos, but there was nothing in the circumstances before this transaction to constitute Boodof or Windsor Autos the plaintiff company's agent. It is urged that the mere provision to dealers of hire-purchase forms for transactions with the plaintiff company showed that all such dealers were acting as their agents. I cannot agree. The plaintiff company provides forms to any dealers from whom it hopes for business. But that hope does not constitute an agency. Reliance was placed on the dictum of Diplock J. in *Lowe* v. *Lombank*.[3] But that dictum did not express a concluded view, and the estoppel envisaged in it was based on different documents in different circumstances from those in the present case.

I find no sufficient evidence to show that the dealer was the agent of the hire-purchase company. Both the dealer and the hirer are concerned to bring the finance company into a deal whereby it will buy the car from the dealer and rent it to the hirer. They both play their part in trying to secure that result. They are both equally concerned to obtain the hire-purchase company's acceptance. The fact that the dealer is habitually so concerned, whereas the hirer is only occasionally so concerned, does not make the dealer any more an agent than the hirer.

The plaintiff company on the other hand contends that the dealer is the hirer's agent. In normal circumstances the dealer does not, in my judgment, act as agent for the hirer. Mr. Martin argues forcibly that the fact that a hirer arms a dealer with a signed hire-purchase document in order that the dealer may induce the hire-purchase company to enter into the transaction indicates that the dealer is acting as agent of the hirer. I do not accept that argument. In order to sell his car to the hire-purchase

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[3] [1960] 1 W.L.R. 196, 206; [1960] 1 All E.R. 11, C.A.

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company he must get a signed hire-purchase agreement from the would-be hirer. It is in pursuance of his own interests that he procures and hands that document to the hire-purchase company: I see no reason to deduce that, in addition to acting on his own behalf, he is also the agent of the hirer for that purpose.

It is contended for the plaintiff company that there was apparent authority, or estoppel by negligence, which would disentitle the defendant to disclaim liability for the contract. Mr. Martin relies on *Eastern Distributors Ltd.* v. *Goldring* (*Murphy, Third Party*).[4] There the facts were complicated and different from those in the present case. A dealer and a car owner had agreed that the dealer should sell the car owner's car to a hire-purchase company, the owner agreeing to take back his car on hire-purchase. Sufficient money was thereby provided to enable him to obtain enough to pay a deposit on the hire-purchase of a second car, which was the real object of the transaction. The dealer sold the first car to the hire-purchase company, but it refused to enter into a transaction over the second car. The owner tried to repudiate as against the hire-purchase company the transaction relating to the first car by saying that the dealer's authority was limited to selling either two cars or none. In this court Devlin J. said[5]: " But equally it is clear that as against Murphy "—that is the owner—" the plaintiffs acquired a good title to the Bedford. " Coker "—that is the dealer—" represented that the car was " his, and Murphy was privy to that representation being made; " so neither can be heard to say that Coker had not a good title " to transfer to the plaintiffs. Or, if the matter be looked at as " one of principal and agent, the plaintiffs, being ignorant of " the limitation placed on Coker's authority, are not affected " by it."

That case is wholly different from the present case. Here the defendant, by signing the hire-purchase agreement, was not clothing Boodof with any authority or any agency. Nor were the hire-purchase company misled into believing that he had any authority from the defendant. They merely believed that it was a genuine document. They did not know the defendant's signature or anything about the defendant, save what the document told them. They did not know that he had let Boodof fill in the form afterwards. There was no more apparent authority in this case than in any normal honest case.

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[4] [1957] 2 Q.B. 600.

[5] Ibid. 606.

The suggestion that the defendant is liable through his negligence and is estopped from denying the truth of the contract which he allowed to be put forward is met, I think, by the cases to which Mr. Henry referred. Even if the dealer were his agent, there was no duty in the defendant to use care towards the plaintiffs: see *Wilson and Meeson* v. *Pickering*,[6] where Lord Greene M.R. said; " But it is sufficient for present purposes to say that " this type of estoppel can only arise where there is some duty " toward the person who seeks to rely on it." Moreover, the doctrine of estoppel by negligence applies only to negotiable instruments. In the same case the Master of the Rolls said [7]: " The view, which so far as my researches go, appears to me to " have the weight of judicial opinion behind it is that, apart, of " course, from some specific representation of authority or some " holding out or some special character of the agent from which " his authority would naturally be inferred, the rule that a person " who signs an instrument in blank cannot be heard as against a " person who has changed his position on the faith of it, to assert " that the instrument as filled in is a forgery or that it was filled " in in excess of the agent's authority, is confined to the case of " negotiable instruments."

Further, it is argued (rightly, I think) that the negligence of the defendant was not the proximate cause of the loss, and that the cause was the fraud of Boodof, which was not to be anticipated: see *Swan* v. *North British Australasian Co. Ltd.*[8] I doubt whether, even if the defendant would, apart from the agreement, be bound by estoppel, an agreement unenforceable under the Hire-Purchase Act can by estoppel be rendered valid and enforceable. However, in my judgment the defendant is not bound by the purported hire-purchase agreement. It was not the contract that he made. The dealer was neither agent for the plaintiffs nor for the defendant, and no estoppel arises. The plaintiffs' claim, therefore, fails.

But the defendant has not made out his counterclaim for a return of the deposit. The dealer received the deposit, it being intended that it should go towards the first instalment of rent when the hire-purchase transaction became effective. If it had become effective, he would have received it as an instalment of rent as agent (quoad the defendant) of the plaintiff company. But no contract was ever made. Therefore, in my judgment, the dealer held that money not on behalf of the plaintiff company but on behalf of the defendant, who could undoubtedly have sued the dealer for money had and received.

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[6] [1946] K.B. 422, 425; 62 T.L.R. 223; [1946] 1 All E.R. 394, C.A.

[7] [1946] K.B. 422, 427.

[8] (1863) 2 H. & C. 175, Ex.Ch.

It is argued that the plaintiff company has obtained the benefit of the initial payment of £65 in that, when it sent its cheque to the dealer for the purchase price of the car, the £65 was deducted from the price as an amount for which the dealer gave it credit. But, in my view, that fact raises no implications. So far as the merits are concerned, the defendant by his foolish and careless conduct has undoubtedly caused some loss to the plaintiff company. What the extent of that loss is I know not; but it seems to me that he cannot complain as a matter of justice that he does not recover from it the £65. As a matter of law, in my judgment his claim to do so fails. I would therefore allow the appeal by dismissing both the claim and the counterclaim.

HARMAN L.J. In order that either side should wholly succeed in this appeal it was necessary to show that there was an agency involved either as between the discount company and the dealer, or between the defendant and the dealer. My Lord has reached the result that there was no agency involved in either direction, and I agree with him. It follows that neither side can wholly succeed. The discount company cannot enforce the so-called agreement because there never was a valid agreement. The defendant cannot get back his deposit, which never reached the discount company through its agent (the dealer), because he was not its agent. It is, therefore, to some extent a drawn battle.

The primary ground, in my judgment, on which the claim of the discount company fails is that there never was in fact an agreement between them and the defendant at all. There was no consensus ad idem; and once you come to the conclusion that my Lord does (and so do I), that the dealer was not authorised to make an agreement, but was in fact acting on his own behalf and in furtherance of his own business, and using this blank form which the defendant filled up in his careless way as an adjunct to his own trade, then you can see that there never was any consensus, and nothing on which the plaintiff company could sue. Having treated the agreement as a nullity, neither can the defendant sue as the result of any breach of it; and, therefore, each party is left to bear its own loss. That means allowing the appeal.

DAVIES L.J. I agree, for the reasons which my Lords have stated.

Appeal allowed.
Claim and counterclaim dismissed.
No order as to costs.
Leave to appeal granted.

Solicitors: *Lovell, White & King; Vizard, Oldham, Crowder & Cash.*

M. M. H.

CAMPBELL DISCOUNT CO. LTD. *v.* BRIDGE.

[Plaint No. QO 1562.]

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Holroyd Pearce, Harman and Davies L.JJ.

Contract—Penalty—Hire-purchase agreement—Sum payable for right to terminate—Whether penalty—Whether principle of equity applicable.

Hire-Purchase — Hire-purchase agreement — Penalty — Termination of agreement by hirer—Claim by owners under depreciation clause for two-thirds purchase price.

Judicial Precedent—Court of Appeal reasoning inconsistent with earlier decision—Earlier decision to be followed.

The hirer of a car under a hire-purchase agreement with a finance company, having made an initial payment equal to £105, paid one monthly instalment on the total hire-purchase price of £482 10s. and then informed the company in writing that he could not keep up the payments, and returned the car to them.

Clause 6 of the agreement provided that: "The hirer may at any "time terminate the hiring by giving notice of termination in "writing to the owners, and thereupon the provisions of clause 9 "shall apply." Clause 9 provided that, if the agreement was for any reason terminated before the vehicle became the hirer's property, the hirer "shall forthwith . . . pay to the owners . . . "by way of agreed compensation for depreciation of the vehicle such "further sums as may be necessary to make the rentals paid and "payable hereunder equal to two-thirds of the hire-purchase price."

On the company's claim for £206 3s. 4d. under clause 9, the county court judge held that the sum was a penalty and dismissed the claim. On appeal by the company, the hirer cross-appealed on the ground that if the sum was not a penalty the bargain was harsh and unconscionable, and that the court in the exercise of its equitable jurisdiction should not enforce it:—

Held, (1) allowing the appeal, that, looking at the contract at the date of its creation, the amount claimed was not a penalty but was the sum payable as compensation to the owners for the hirer's exercise of his right under clause 6 to terminate the contract before the hiring period had expired.

Dunlop Pneumatic Tyre Co. Ltd. v. *New Garage and Motor Co. Ltd.* [1915] A.C. 79; 30 T.L.R. 625, H.L.; *Associated Distributors Ltd.* v. *Hall* [1938] 2 K.B. 83; 54 T.L.R. 433; [1938] 1 All E.R. 511, C.A. applied.

Cooden Engineering Co. Ltd. v. *Stanford* [1953] 1 Q.B. 86; [1952] 2 T.L.R. 822; [1952] 2 All E.R. 915, C.A. distinguished.

(2) Dismissing the cross-appeal, that even if the amount of compensation were penal, the hirer was not entitled to any equitable relief in the absence of any evidence as to the surrounding circumstances of this particular bargain and its results which would show that it was so harsh and unconscionable that it ought not to be enforced.

Dicta in *Stockloser* v. *Johnson* [1954] 1 Q.B. 476; [1954] 2 W.L.R. 439; [1954] 1 All E.R. 630, C.A. considered.

Per curiam. If the present state of the law as to penalties is such that the honest man who terminates his contract is in a worse position than the man who breaks his contract, that unsatisfactory position must be remedied by the legislature, for the courts cannot interfere on equitable grounds with ordinary contracts freely entered into which have turned out harshly for one of the parties.

Appeal from Judge Bassett, sitting at Ilford County Court.

By an agreement dated July 20, 1958, the plaintiffs, a hire-purchase finance company, let on hire to the defendant Bridge a Bedford Dormobile vehicle with option to purchase. Clause 6 of the agreement provided: "The hirer may at any time terminate the hiring by giving notice in writing to the owners, "and thereupon the provisions of clause 9 hereof shall apply." Clause 9 provided: "If this agreement or the hiring be terminated for any reason before the vehicle becomes, under "clause 5 hereof, the property of the hirer, then the hirer shall "no longer be in possession of the vehicle with the owners' "consent and the hirer shall forthwith (a) at his own cost and "risk deliver up the vehicle in a proper state of repair and "condition together with all necessary licences, registration books "or certificates, insurance policy and other documents relative "to the vehicle to the owners at such address as they may direct; "and (b) pay to the owners all arrears of hire rent due and "unpaid at the date of termination of the hiring together with "interest thereon stipulated under clause 1 hereof and by way "of agreed compensation for depreciation of the vehicle such "further sum as may be necessary to make the rentals paid and "payable hereunder equal to two-thirds of the hire-purchase "price as specified in the schedule hereto; . . ."

Bridge under the agreement agreed to pay the hire-purchase price of £482 10s. by a deposit of £105 (consisting of £10 in cash and credit of £95 for a car traded in) on the signing of the agreement and 36 monthly instalments of £10 9s. 2d. each, beginning on August 20, 1959. He paid the equivalent of the £105 and the first instalment; but on September 3, 1959, he wrote to the plaintiff company as follows: "Owing to unforeseen personal "circumstances I am very sorry but I will not be able to pay "any more payments on the Bedford Dormobile. Will you "please let me know when and where I will have to return the "car. I am very sorry regarding this but I have no alternative"; and on September 14 he returned the vehicle to the dealers from whom he had obtained it and it came eventually into the possession of the plaintiff company.

The company sued the hirer in the county court for £206 3s. 4d., being two-thirds of the hire-purchase price less payments already made, by way of alleged agreed compensation under clause 9 of the agreement. By his defence the hirer admitted that he had terminated the agreement but denied that he was indebted to the company in the sum claimed or in any other sum. He claimed that the compensation for depreciation claimed was a penalty and was not recoverable. The county court judge (in a two-word note of his judgment) on May 3, 1960, held that the amount claimed was a penalty and dismissed the company's claim. The plaintiffs appealed. The hirer by a cross-notice asked that the judgment be affirmed both on the grounds relied on by the county court judge and also on the further and additional ground that in the exercise of the court's equitable jurisdiction the hirer should be relieved of all obligation and liability in respect of the company's claim.

Stanley Rees Q.C. and *John Alliott* for the company. First, on the facts proved and admitted no question of penalty or pre-estimate of damage arose here, for there was no breach of contract but merely an exercise of the option in clause 6 by the hirer's giving notice of termination in writing, and the price of the option agreed under clause 9 thereupon became payable. That point, it is submitted, is concluded in favour of the company by the unanimous decision of the Court of Appeal in *Associated Distributors Ltd.* v. *Hall*,[1] cited to the county court judge. The question whether a stipulated sum is a penalty or a genuine pre-estimate of damage has to be decided according to the rules laid down by Lord Dunedin in *Dunlop Pneumatic Tyre Co. Ltd.* v. *New Garage and Motor Co. Ltd.*,[2] by construing the contract and considering its inherent circumstances at the date when it was made and not at the time of the breach: contrast *Lamdon Trust Ltd.* v. *Hurrell.*[3]

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[1] [1938] 2 K.B. 83; 54 T.L.R. 433; [1938] 1 All E.R. 511, C.A.

A consideration of the particular facts at the time of the breach and its results for both parties is only permissible if the court considers the question of equitable relief raised on the hirer's cross-notice—a question which was neither pleaded nor argued in the court below, and as to which there is no evidence to justify the application of equitable principles. If such relief is contemplated, the company would also wish to adduce evidence and there would have to be a new trial: see *per* Somervell and Denning L.J. in *Stockloser* v. *Johnson*[4] that whether a transaction is harsh or unconscionable is to be decided by the actual circumstances of the particular case and as to the possibility of equitable relief. Romer L.J. in that case took another view on the suggested equitable relief.[5] In *Cooden Engineering Co. Ltd.* v. *Stanford*[6] Somervell L.J., with whom Hodson L.J. agreed, said that a penal clause might give rise to equitable relief; but in an important dissenting judgment Jenkins L.J.[7] dealt with the matter more fully and pointed out how few cases there are on record in which stipulated sums have been held to constitute a penalty. That case is distinguishable, both because of the harshness of the clause which required 100 per cent. compensation for depreciation and because there was there a breach of contract by the hirer.

Secondly, the clause in this case requiring compensation of two-thirds of the hire-purchase price is a genuine pre-estimate of the damage for termination of the contract at any time during its currency, for the finance company pays out a large lump sum on the signing of the contract and if the option to terminate is exercised it receives back a car the value of which is depreciated both by use and the passage of time which destroys the market value, and also loses the benefit of monthly payments over a three-year period. This clause was based on section 4 of the Hire-Purchase Act, 1938, which allows for compensation at 50 per cent. of the hire-purchase price. It is not a penalty.

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[2] [1915] A.C. 79, 86; 30 T.L.R. 625, H.L.

[3] [1955] 1 W.L.R. 391, 394; [1955] 1 All E.R. 839, C.A.

[4] [1954] 1 Q.B. 476, 488, 492; [1954] 2 W.L.R. 439; [1954] 1 All E.R. 630, C.A.

[5] [1954] 1 Q.B. 476, 501.

[6] [1953] 1 Q.B. 86, 98; [1952] 2 T.L.R. 822; [1952] 2 All E.R. 915, C.A.

[7] [1953] 1 Q.B. 86, 112–113.

Neil Lawson Q.C. and *J. G. K. Sheldon* for the hirer. The real claim here was for damages for breach of contract: see particulars of claim. Further, the hirer returned the car, not to the owners but to the dealer who was not their agent, so that he was in breach of the agreement, and his letter was not a notice of termination under clause 6. When he returned the car he had no idea that he would have to pay anything further. *Associated Distributors Ltd.* v. *Hall*[8] is therefore distinguishable, first, because the sum claimed is a penalty for breach of contract and not the price of the option; and, secondly, because although clause 9 here is only slightly different from that considered in *Hall's* case,[8] the line of reasoning in that case, based on the unreported decisions cited in Jones and Proudfoot, Notes on Hire-Purchase Law (2nd ed., at p. 107)—followed by Simonds J. in *In re Apex Supply Co. Ltd.*[9]—was rejected by the majority of this court in *Cooden Engineering Co. Ltd.* v. *Stanford*,[10] and its authority was thereby considerably weakened. That leaves the court free to follow the later authority. On the reasoning in *Cooden's* case,[10] clause 9 in the present case is a penalty clause.

[HOLROYD PEARCE L.J. There is an important dissenting judgment in *Cooden's* case,[10] whereas the decision in *Hall's* case[11] is unanimous. Unless it can be distinguished we are bound by it, and the hirer's letter here is the clearest possible notice to terminate.]

Serious and important results will follow if that is the position, for it will mean that, in the many cases where hirers in fact return a vehicle, hire-purchase companies can rely on similarly framed clauses to proceed against them. The result of *Cooden's* case[12] is that if a hirer breaks the contract and the owners thereupon terminate the agreement the hirer, even if dishonest, can escape, because he can claim that the sum is a penalty and unenforceable against him, whereas if he is an honest man who says that he cannot keep up the payments and returns the car he is caught by a clause purporting to be the price of an option. That would be an unsatisfactory state for the law to be in.

If the court does not apply the majority decision in *Cooden's* case,[12] it is asked to exercise its equitable jurisdiction and give relief from a harsh and unconscionable bargain. The prayer for such relief in the cross-notice springs from the dicta of Somervell and Jenkins L.JJ. in *Cooden's* case [13] and of Somervell and Denning L.JJ. in *Stockloser* v. *Johnson*.[14] Jenkins L.J. in *Cooden's* case [15] referred to the line of authorities in which equity has given relief and distinguished them; but those cases are not apposite in this case where a claim for the payment of money has been resisted.

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[8] [1938] 2 K.B. 83.

[9] [1942] Ch. 108; [1941] 3 All E.R. 473.

[10] [1953] 1 Q.B. 86.

[11] [1938] 2 K.B. 83.

[12] [1953] 1 Q.B. 86.

[HOLROYD PEARCE L.J. The common lawyers say that there should be an equity and the Chancery lawyers say no. But there is no evidence here to show that the company has done well out of the car and they have an affidavit to show that they did badly.]

The hirer is an assisted person and would require legal aid before expert evidence as to car values could be tendered.

On the facts this hirer is liable to pay something like £350 for the hire of a car with a value of £475 for a period of seven weeks. That is so penal a provision that it comes within the territory where the court could be asked to give relief. The court should take judicial notice of the fact that hire-purchase finance companies are in business to lend money at substantial rates of interest and the car which is returned is one which has at least three years of life in it.

Sheldon following. The decision in this case will have wide repercussions if the court expresses a view as to the rightness of a " compensation " clause fixed at two-thirds of the hire-purchase price, or, alternatively, indicates that there is no way in which a penal provision framed in the form of an option can be overcome.

[HOLROYD PEARCE L.J. The court is being asked to tear up a contract entered into freely between the parties and its decision would apply in all cases where a contract contained a term which later turned out to be unfavourable to one party.]

If the court concludes that on its face the bargain is unreasonable it can correct the position (a) by looking at the substance of the term rather than its form, and (b) by exercising its equitable jurisdiction to relieve against liability: see *Alder* v. *Moore*,[16] in which the court looked at the true nature of the transaction. An examination of this so-called option shows that it is in substance a prohibition against termination at any time under two years, since if the hirer returns the car under that period he has to pay the hire for two years, with a penalty payable in the event of breach.

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[13] [1953] 1 Q.B. 86, 98, 112–113.

[14] [1954] 1 Q.B. 476, 488, 492.

[15] [1953] 1 Q.B. 86, 112.

[16] [1961] 2 W.L.R. 426; [1961] 1 All E.R. 1.

As to the equitable jurisdiction, the court will give relief where it decides that a sum was agreed to be paid merely as security for the non-performance of a collateral contract: see *per* Kay J. in *Law* v. *Local Board of Redditch*.[17]

[HARMAN L.J. Kay J. was saying no more than that the theory about liquidated damages and penalty was invented in the courts of equity in that the Lord Chancellor would grant an injunction where the payment at law was merely in terrorem for a collateral object and not by way of damages, and that since 1873 both divisions of the court can act in the same way.]

If in this agreement there was a clause that the hirer could exercise his option at any time provided he paid £10,000, that would be held by any court to be in terrorem. That extravagant example is no different from the penal provision in this agreement.

[HARMAN L.J. Anyone who exercised such an option would be extremely foolish.]

It is common knowledge that not everyone reads these documents. The hirer might not know that the provision was there.

Rees Q.C. was not called on to reply.

HOLROYD PEARCE L.J. This is an appeal from a judgment dismissing the plaintiffs' claim for £206 3s. 4d. The plaintiffs are a finance company from whom the defendant hired a motor-car under a hire-purchase agreement. The defendant, having exercised his right to return the motor-car, was liable under the terms of the agreement to pay a certain sum by way of agreed compensation for depreciation of the vehicle. The judge held that that sum was a penalty, and was not recoverable. Mr. Stanley Rees for the plaintiffs contends that the judge erred in that no question of whether the sum was a penalty arose since there was no breach, for by returning the car the defendant merely exercised an option at a certain price. Moreover, even if the question of whether the sum was a penalty did arise and if it could be a penalty, it was not in fact a penalty, Mr. Rees argues, but is a genuine pre-estimate of damage in circumstances that are bound to contain many imponderables.

Mr. Neil Lawson contends that the judge decided rightly. He further argues on a cross-notice that even if the sum claimed is not a penalty, the court under its equitable jurisdiction should relieve the defendant of all obligations and liabilities in respect of the sum claimed, and dismiss the action. That point was never taken in the court below, nor was any evidence given as to the circumstances of the transaction. [His Lordship stated the facts set out above, read clauses 6 and 9 (supra) and continued:] Clauses 7 and 8 were referred to for the purposes of the argument. By clause 7: "If the hirer shall fail to pay any sum due here-"under or to observe any of the stipulations in clause 4 hereof "or any other stipulations on his part contained herein the owners "may thereupon and without notice terminate the hiring and/or "this agreement, and may . . . retake possession of the vehicle "whereupon the provisions of clause 8 hereof shall apply."

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[17] [1892] 1 Q.B. 127, 133.

Clause 8 says: "Without in any way derogating from their "rights under clause 7 hereof, and without discharging or pre-"judicing any pre-existing liability of the hirer to the owners "(including the liability of the hirer under clause 9 hereof) this "agreement and the hiring hereunder shall forthwith and for all "purposes be determined absolutely and come to an end" on certain events including death of the hirer, distress, bankruptcy, liquidation and so forth.

The hirer exercised his option under clause 6 by giving notice. Clause 9 then applied. Under clause 9 (*a*) the hirer had to return the vehicle, which he has done. Under clause 9 (*b*) he has to pay such sum as will make up the rentals to two-thirds of the purchase price, namely, the sum here claimed. No breach of contract or damages are in question, for the hirer is simply exercising his right to return the car with all the incidents set out under clause 9 (*a*) and (*b*). Therefore, the doctrine relating to penalties does not apply.

A similar situation was considered in *Associated Distributors Ltd.* v. *Hall.*[1] There the hirer had hired a tandem bicycle under a hire-purchase agreement. By clause 5 of the agreement he was given an option of terminating the hiring at any time by returning the bicycle, but he remained liable for the rent up to the date of the return and for all other sums payable under the agreement and damages (if any) for any breach of any term of the agreement. By clause 7 it was agreed that in the event of the hiring being determined he was to pay by way of compensation for depreciation of the goods, in addition to any other sums payable thereunder, such sums as, with the amount previously paid for rent, should make up a sum equivalent to not less than one-half of the total amount including the option purchase price payable under the agreement. This court held that there was no question as to the plaintiffs' claim under clause 7 "being "liquidated damages or in the nature of a penalty," and that, therefore, the owner was entitled to recover his money.

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[1] [1938] 2 K.B. 83; 54 T.L.R. 433; [1938] 1 All E.R. 511, C.A.

Slesser L.J.,[2] having referred to cases in which payments were made as compensation for depreciation where the hirer's default had brought the agreement to an end, continued: "In such cases ". . . the question has arisen whether the sum which the owner "may claim by way of compensation for depreciation of the goods, "in addition to any other sums payable as provided in clause 7, "is liquidated damages or a penalty. The cases as I understand "them—two in the Divisional Court and a decision in the Court "of Appeal—seem to establish the view that they are to be "regarded as liquidated damages, but it is not necessary in the "present instance for us to express any opinion upon those decisions, because they have nothing to do with the particular case "which we are here to determine, for here the hirer, not the "owner, terminated the hiring. He has exercised an option and "the terms on which he may exercise the option are those set out "in clause 7. The question, therefore, whether these payments "constitute liquidated damages or a penalty in the instances "mentioned does not arise in the present case."

Scott and Clauson L.JJ.[3] agreed, but Clauson L.J. pointed out "that it would save much misunderstanding, and would certainly "conduce to the reputation as honest traders of those who hire out "bicycles under these circumstances, if they were to take steps "whenever this form of contract is used, to make it clear by a "statement on the face of the contract, that the young person "who enters into it is under the liability" which the court was enforcing in that case. I agree with that observation. The Hire-Purchase Acts of 1938 and 1954 have secured that result in transactions within their scope, but the transaction in the present case, being over £300 in amount, is unfortunately outside their scope.

Mr. Neil Lawson sought to distinguish that case in two ways. First he argued that the defendant broke the terms of the hiring agreement by not giving proper notice of termination and by returning the car not to the owners but to the dealer who was not their agent. If that be so he can argue that the sum claimed under clause 9 is damages for his own breach. He relied on

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[2] [1938] 2 K.B. 83, 87–88.

[3] Ibid. 89.

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Cooden Engineering Co. Ltd. v. *Stanford*[4] as establishing that the sum could be and is a penalty on the facts of the present case. But in my judgment that argument is quite untenable. The letter of September 3 was a notice to terminate, and the car was quite properly returned to the dealer, who accepted it. The plaintiff company gave the defendant no other address to which he was to return it. They waived their rights to have the car delivered to any other address, and accepted delivery to the dealer as the fulfilment by the hirer of his obligations under clause 9 (*a*).

Mr. Lawson's second point is that the reasoning which lay behind *Associated Distributors Ltd.* v. *Hall*[5] has been disapproved by this court in the later case of *Cooden Engineering Co. Ltd.*[6] In the former case, he argues, Slesser L.J.[7] referred to certain cases reported in Jones and Proudfoot on Hire-Purchase Law (2nd ed.) which were decided on reasoning that did not commend itself to this court in the later *Cooden Engineering* case.[8] Salter J. in *Elsey & Co. Ltd.* v. *Hyde*[9] had said that since a clause provided for payment in events not caused by a breach as well as in those caused by a breach, the payment under the clause in compensation for a breach could not be a penalty; and Greer L.J. in *Chester & Cole Ltd.* v. *Wright*[10] had said that where a hirer had to pay such a sum as is here claimed—whether on termination through his own fault or from some other cause—it was not a penalty, but a sum to become payable in a certain event, namely, termination of the agreement as thereby provided, and not by way of damages for breach of the agreement. Simonds J. held this view binding on him in *In re Apex Supply Co. Ltd.*[11] It is argued that since that reasoning of Salter J. and Greer L.J. was disapproved by the majority in the *Cooden Engineering* case,[12] therefore the effect of the decision in *Associated Distributors Ltd.* v. *Hall*[13] has been weakened.

I cannot agree. In the *Cooden Engineering* case[14] Somervell L.J., with whom Hodson L.J. agreed, disapproved of the reasoning of Salter J. and Greer L.J. But he left open the question decided in *Associated Distributors Ltd.* v. *Hall*.[15] The reasoning of which he disapproved is not necessary to, nor is it the basis of, the decision in *Associated Distributors Ltd.* v. *Hall*[15]; nor did Somervell L.J. suggest that the decision was wrong. Moreover, it was the unanimous decision of this court, whereas the *Cooden Engineering* case[16] was a majority decision with a powerful dissenting judgment by Jenkins L.J. Even had the *Cooden Engineering* case[16] criticised the reasoning in *Associated Distributors Ltd.* v. *Hall*,[17] we should in my view be bound by the decision in the earlier case. It was decided, rightly as the law now stands, on the ground that the sum payable was the price of the hirer's right to terminate, and could not be considered as a penalty since it was not payable in respect of any breach.

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[4] [1953] 1 Q.B. 86; [1952] 2 T.L.R. 822; [1952] 2 All E.R. 915, C.A.

[5] [1938] 2 K.B. 83.

[6] [1953] 1 Q.B. 86.

[7] [1938] 2 K.B. 83–87.

[8] [1953] 1 Q.B. 86.

[9] (1926) (unreported). See Jones and Proudfoot's Notes on Hire-Purchase Law, 2nd ed., at p. 107.

[10] (1930) op. cit. 124, 129.

[11] [1942] Ch. 108; [1941] 3 All E.R. 473.

[12] [1953] 1 Q.B. 86.

[13] [1938] 2 K.B. 83.

[14] [1953] 1 Q.B. 86, 96.

[15] [1938] 2 K.B. 83.

Finally, Mr. Lawson argues that it is unfair that the defendant cannot attack as being a penalty the sum payable under clause 9, whereas he could have done so had he made default in his obligations. It is inequitable that the honest man should be in a worse position than the defaulter. The court should, he urges, regard the sum payable in this case as analogous to a penalty, and unconscionable, and it should therefore decline to enforce its payment. He has cited no case where such a course has been taken in similar circumstances. He relies on the following dicta in the *Cooden Engineering* case.[16] But it must be remembered that the hire-purchase agreement in that case was extremely harsh to the hirer who was bound to pay all the instalments even if he returned the hired vehicle immediately after the hiring had started.

Somervell L.J. said[18]: "In *In re Apex Supply Co. Ltd.*[19] "the claim was based on the hiring company having gone into "liquidation. Though it may well be that the conclusion would "be the same, it might fall to be considered on equitable rather "than on common law principles." And Jenkins L.J. deals more fully with the matter. He said[20]: "Although in the "view I take the sum payable under clause 11 is not a penalty "in the sense contended for in the present appeal, it might I "suppose conceivably have been argued that the provision in "question is a penal provision in the sense that it is so oppressive "and unconscionable that equity should grant relief from it upon "equitable terms. Compare *In re Dagenham (Thames) Dock* "*Co.; Ex parte Hulse*[21]; *Kilmer* v. *British Columbia Orchard*

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[16] [1953] 1 Q.B. 86.
[17] [1938] 2 K.B. 83.
[18] [1953] 1 Q.B. 86, 98.
[19] [1942] Ch. 108.
[20] [1953] 1 Q.B. 86, 112–113.
[21] (1873) L.R. 8 Ch. 1022.

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" *Lands Ltd.*[22]; and *Steedman* v. *Drinkle*,[23] cases in which relief " was successfully sought from provisions for forfeiture of instal- " ments of purchase money in contracts for the sale of land " comparable for the present purpose to the one considered by " Farwell J. in *Mussen* v. *Van Diemen's Land Co.*,[24] and note " Farwell J.'s explanation in the last mentioned case of the prin- " ciple on which those cases proceeded. But if that argument " were tenable here at all—and I express no opinion one way or " the other about that, for no such argument has been raised in " the present case—it surely could not be equitable in the circum- " stances to grant relief on terms which would put the owners in " any worse position than they would have been in if the hirer " had returned the vehicle under clause 10 on the date on which " they repossessed themselves of it under clause 11. Be that as " it may, the question does not arise in the present case, in which " the owners' claim has been contested solely on the ground that " the sum sued for is a penalty in what I have termed the relevant " sense, and as such wholly irrecoverable." I respectfully agree with those observations.

Clause 6 is not a penal provision. It is a right to return the car before the period of hiring had expired. Without clause 6 the hirer could not do so. In former days there were many agreements that contained no such right. There must obviously be a provision to compensate the owners to some extent. The amount of such compensation must be a question of degree. Even assuming (without deciding) that the figure of two-thirds under clause 9 is so high as to be penal, and that had the hirer made default, that figure would be held to be a penalty, yet in order to show that the bargain was unconscionable and unenforceable the particular facts and the resulting circumstances must be investigated. Whereas in considering whether a sum payable constitutes a penalty, the contract itself at the time of its creation and its inherent circumstances are the test (see *Dunlop Pneumatic Tyre Co. Ltd.* v. *New Garage and Motor Co. Ltd.*,[25] *per* Lord Dunedin), in considering whether equity should enforce an agreement, the general circumstances surrounding the agreement and also the later facts are relevant.

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[22] [1913] A.C. 319; 29 T.L.R. 319, P.C.

[23] [1916] 1 A.C. 275; 32 T.L.R. 231, P.C.

[24] [1938] Ch. 253; 54 T.L.R. 225; [1938] 1 All E.R. 210.

[25] [1915] A.C. 79, 86; 30 T.L.R. 625, H.L.

In *Stockloser* v. *Johnson*,[26] where a purchaser sought unsuccessfully to recover forfeited deposits, Somervell L.J. said[27]: "As "the basis of the plaintiff's right, if he has one, is the unconscionability of the defendant's retaining sums which have been paid "to him as instalments, I agree that the circumstances of the "particular case should be looked at and the question is not one "to be decided by looking only at the contract."

Denning L.J. said[28]: "These illustrations convince me that "in a proper case there is an equity of restitution which a party "in default does not lose simply because he is not able and willing "to perform the contract. Nay, that is the very reason why he "needs the equity. The equity operates, not because of the "plaintiff's default, but because it is in the particular case "unconscionable for the seller to retain the money. In short, "he ought not unjustly to enrich himself at the plaintiff's "expense. This equity of restitution is to be tested, I think, "not at the time of the contract, but by the conditions existing "when it is invoked."

Romer L.J. on the other hand said[29]: "There is, in my judg"ment, nothing inequitable per se in a vendor, whose conduct is "not open to criticism in other respects, insisting upon his con"tractual right to retain instalments of purchase-money already "paid. In my judgment, there is no sufficient ground for inter"fering with the contractual rights of a vendor under forfeiture "clauses of the nature which are now under consideration, while "the contract is still subsisting, beyond giving a purchaser who "is in default, but who is able and willing to proceed with the "contract, a further opportunity of doing so; and no relief of any "other nature can properly be given, in the absence of some "special circumstances such as fraud, sharp practice or other "unconscionable conduct of the vendor, to a purchaser after the "vendor has rescinded the contract."

In the present case there is no evidence at all establishing that the plaintiff company behaved improperly or unconscionably except in so far as it is argued that the contract was a harsh one. The defendant has not sought leave to bring affidavit evidence. The plaintiffs have offered an affidavit which we have not admitted. But Mr. Lawson has to concede that the plaintiffs have in fact done badly out of the transaction, although he contends that he might be able to show that had they been astuter or more vigilant, they would have done very well out of it.

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[26] [1954] 1 Q.B. 476; [1954] 2 W.L.R. 439; [1954] 1 All E.R. 630, C.A.

[27] [1954] 1 Q.B. 476, 488.

[28] Ibid. 492.

[29] Ibid. 501.

In my judgment, therefore, no case for equitable relief is made out. Only very exceptional circumstances could possibly justify it, for any relief available in respect of hire-purchase agreements must also (it is conceded) be available in respect of all contracts. It would be a novel extension for the law to interfere on equitable grounds with ordinary contracts freely entered into by persons under no duress or mistake merely on the ground that in certain events they have turned out harshly for parties who subsequently wished or were compelled by circumstances to abandon their contracts. Parliament has rightly put certain fetters on hire-purchase contracts on social grounds prompted by considerations of the kind of persons who enter into them, and the nature of the transactions. It has, perhaps unfortunately, chosen not to put fetters on transactions of the size of that in the present case. This court cannot seek to repair that deliberate omission by creating special principles for that purpose. On general principles the evidence (or lack of it) in this case does not justify the court's interference with the contractual rights of the parties. Not without regret I am of opinion that the appeal must be allowed.

HARMAN L.J. I am of the same opinion and though I should like to emulate the laconic terms of the judgment of the county court judge which was expressed in two words, I feel constrained to add a word or two because of the uneasy feeling I have that the position of the law as it stands is not satisfactory. If the judgment of the majority in the *Cooden Engineering* case [30] be right, then the position may be different according to whether there is somewhere behind the termination of the contract a breach by somebody. It has been pointed out quite rightly to us that it is unsatisfactory if the man who honestly admits to the finance company that he cannot go on may have to pay a penalty, but that if he waits for the finance company to exercise their rights and in the meanwhile breaks the contract, he may be able to escape paying it on the ground that penalty for breach of contract is not enforceable in law. I have felt myself oppressed by that consideration.

The solution may be that the minority view in *Cooden Engineering* [30] was in fact the right one. I do not think anyhow

[30] [1953] 1 Q.B. 86.

that the discrepancy can be healed by some rather loose conception of what are called equitable principles. Equitable principles are, I think, perhaps rather too often bandied about in common law courts as though the Chancellor still had only the length of his own foot to measure when coming to a conclusion. Since the time of Lord Eldon the system of equity for good or evil has been a very precise one, and equitable jurisdiction is exercised only on well-known principles. There are some who would have it otherwise, but as at present advised I am of opinion that, at any rate in the instant case, there is no equitable principle that can be called in aid.

Similarly I rather deprecate the attempt to urge the court on what are called equitable principles to dissolve contracts which are thought to be harsh, or which have turned out to be disadvantageous to one of the parties. It is pointed out in one of the cases cited to us yesterday (and Lord Nottingham's observation in *Maynard* v. *Moseley*[31] is still true) that: "the Chancery "mends no man's bargain," and I do not therefore see my way to call in aid equity to mend what may be an unfortunate situation and one which, if it calls for remedy, calls for aid by the legislature rather than by the justiciary.

I therefore agree that this appeal should be allowed, holding as I do that we are bound by the case before Slesser, Scott and Clauson L.JJ.[32] cited by my Lord.

DAVIES L.J. I agree with both judgments.

Appeal allowed.
Judgment set aside and in lieu judgment for appellants for £206 3s. 4d. with costs on county court scale 4.
By consent no order in respect of appellants' costs of appeal and cross-appeal.
Leave to appeal to House of Lords.

Solicitors: *Ronald Brooke & Co., Ilford; Edwards, Son & Noice.*

M. M. H.

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[31] (1676) 3 Swanst. 651, 655.

[32] [1938] 2 K.B. 83.

END OF VOL. 1.

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ATTORNEY-GENERAL
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